Supreme Court, U.S.
FILED
JUN 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-2041

In the

Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, et al, APPELLANTS

v.

THE FIRESTONE TIRE & RUBBER CO., etc. et al, APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

THOMAS T. REMINGTON
Smith, Grimsley, Remington
& Kessler
P.O. Box 2379
Fort Walton Beach, FL 32549
904/243-8194
Attorney for Appellant

June 19, 1987

THE QUESTION

Did the Court's denial (destruction) of appellant's property rights existing in Appellant's accrued cause of action by retroactively applying to Appellant's action the Pullum decision violate Appellant's federal due process rights under the Fourteenth Amendment of the Constitution of the United States.

TABLE OF CONTENTS

THE QUESTION.....i

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS AND STATUTES.....2

STATEMENT OF THE CASE.....3

In 1980 the Florida Supreme Court Declared Fla. Stat. Sec. 95.031(2) (the "twelve year" statute) Unconstitutional.....3

In 1982 Appellant's cause of action accrued.....4

In 1985 the Florida Supreme Court Declared Fla. Stat. Sec. 95.031(2) Constitutional.....4

The Destruction of Appellant's Property Rights Existing in Appellant's Accrued Cause of Action by Retroactively Applying to Appellant's Action the Pullum Decision Violated Appellant's Federal Due Process Rights Under the Fourteenth Amendment of the Constitution of the United States.....5

THE QUESTION IS SUBSTANTIAL.....9

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

TABLE OF AUTHORITIES

Cases

Battilla v. Allis Chalmers Manufacturing Company
392 So.2d 874 (Fla. 1980).....3,7

Chevron Oil Company v. Huson
404 U.S. 97 (1971).....9

Coombs v. Getz
285 U.S. 434, 442 (1932).....8

Gelpcke v. City of Dubuque
1 Wall 175, 17 L.Ed. 520 (1890).....9

George v. Firestone Tire & Rubber Co.
No. CGA 85-0117, MMP N.D. Fla.
June 13, 1986 (Paul, J).....6

Great Northern Ry. Co. v. Sunburst Oil & Refining Company
287 U.S. 358 (1932).....6

Logan v. Zimmerman Brush Company
455 U.S. 422, 428 (1982).....7

Pritchard v. Norton
106 U.S. 124, 132 (1882).....8

Pullum v. Cincinnati, Inc.
476 So.2d 657 (Fla. 1985).....passim

Other Authorities

U.S. Const. XIV.....passim

28 U.S.C. §1257(2).....1

Fla. Stat. (1975) Sec. 95.031(2)....2,3,4,5

Fla. Stat. (1975) Sec. 95.11(3)(e)....2,3,4

In the Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, et al, APPELLANTS

v.

THE FIRESTONE TIRE & RUBBER CO., etc., et al, APPELLEES*

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

---

*The complete list of parties below includes Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy, Florida National Bank, as guardian of the property of Kenneth Cassidy, Sharon Cassidy, as wife of Kenneth Cassidy, The Firestone Tire and Rubber Company, a corporation, Ford Motor Company, a corporation and The Budd Company, a corporation.

OPINIONS BELOW

The judgment of the Supreme Court of Florida appears in the Appendix at page 1a. The opinion of the District Court of Appeal, First District of Florida, appears in the Appendix at page 3a. The decision of the Circuit Court of Escambia County, Florida appears in the Appendix at page 7a.

JURISDICTION

Under 28 U.S.C. §1257(2), Appellant Effie Dell Cassidy, as guardian of Kenneth Cassidy, adjudged mentally incompetent, appeals the March 27, 1987, Final Order of the Supreme Court of Florida denying review of Appellant's appeal from the judgment of the District Court of Appeal, First District of Florida. Appellant's appeal from the judgment of the Florida District Court of Appeal addressed the following ground of appeal to Florida Supreme Court:

"Petitioners (accrued) cause of action is a vested property right which cannot be taken away without being violative of the Fifth and Fourteenth Amendments of the U. S. Constitution."

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, Constitution of The United States:

...nor shall any state deprive any person of life, liberty or property without due process of law...

Florida Statutes (1975), Sec. 95.11 (3)(e), the (Statute of Limitation):

--Action other than for recovery of real property shall be commenced as follows:

(3) within four years

(e) an action for injury to a person founded on the design, manufacture, distribution or sale of personal property that permanently incorporated in an improvement of real property including fixtures.

Florida Statutes (1979) Sec. 95.031(2), the (Statute of Repose):

--Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

STATEMENT OF THE CASE

The legislative enactments and court decisions appertaining to the facts of this case and the question involved in this appeal where commenced in 1980 when the Florida Supreme Court in Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980) declared Florida Statutes (1979),

Sec. 95.031(2) (the "twelve year" statute of repose) unconstitutional. Thereafter, for five years the law remained unchanged until in 1985 the Florida Supreme Court, in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) overruled its decision in Battilla and declared Sec. 95.031(2) constitutional. The next year, at its first session following the Pullum decision, the Florida State Legislature repealed the "twelve year" statute of repose (Sec. 95.-031(2)).

Examination of the facts of Appellant's case shows first that Appellant's cause of action accrued on February 6, 1982, when Kenneth Cassidy was injured by the explosion of a multi-piece rim wheel manufactured by Appellees, and that his action was instituted on June 2, 1983, in full compliance with Florida Statutes, Sec. 95.11(3)(e), the law prevailing at the time. Thereafter, during the pendency of Appellant's action awaiting trial, The Florida Supreme Court decided in Pullum v. Cincinnati, supra, declaring the "twelve year" statute (Sec.

95.031(2) constitutional. The Pullum decision has been applied retroactively to Appellant's action contra to the premise of Appellant's position that the retroactivity applied violates Appellant's rights protected by provisions of the Constitution of the United States. Therein issues the questions presented to this Supreme Court of the United States by Appellant's appeal, to wit:

QUESTION

Did the Court's denial (destruction) of Appellant's property rights existing in Appellant's accrued cause of action by retroactively applying to Appellant's action the Pullum decision violate Appellant's federal due process rights under the Fourteenth Amendment of the Constitution of the United States:

THE DESTRUCTION OF APPELLANT'S PROPERTY RIGHTS EXISTING IN APPELLANT'S ACCRUED CAUSE OF ACTION BY RETROACTIVELY APPLYING TO APPELLANT'S ACTION THE PULLUM DECISION

VIOLATED APPELLANT'S FEDERAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

It is clear from the cases that this Court leaves it to the State Courts, with few exceptions, to decide whether to make its decisions retroactive or prospective. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). The one most noteable exception to this right held by state courts is where to allow a decision of the court to be applied retroactively the federal due process rights of a party are to be violated. The applicable law and facts of Appellant's case demonstrate that this exception applies to Appellant's appeal to this court. George v. Firestone, a federal case[1], provides a comprehensive treatment of the federal question, same as that involved in Appellant's

---

1 Opinion of the United States District Court for the Northern District of Florida (United District Judge Maurice Paul) (Appendix p. 12)

appeal. We cite:

1

"Plaintiff has indeed acquired a property right which would be destroyed by retrospective operation of Pullum. During the dormancy of the statute of repose, between Battilla and Pullum, plaintiff's cause of action accrued. An accrued cause of action must be carefully distinguished from the sort of generalized right to sue possessed by one who has not yet been injured, one merely has a non-vested right to sue which can be legislatively withdrawn." (Emphasis supplied)

2

"An accrued cause of action, on the other hand, is a species of property protected by the due process clause, of which plaintiff may not be deprived by retroactive application of Pullum. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amend-

ment's due process clause."); Coombs v. Getz, 285 U.S. 434, 442 (1932) ("[N]either vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." (Emphasis supplied).

3

Pritchard v. Norton, 106 U.S. 124, 132 (1882) ("Hence it is that a vested right of action is property in the same sense in which tangible things are property and it is equally protected against arbitrary interference.")

4

"This Court concludes that plaintiff's cause of action validly accrued and became vested when Plaintiff was injured. That cause of action is a property right... [R]etroactive application of Pullum to bar plaintiff's previously accrued cause of action would plainly violate plaintiff's federal due process rights."

THE QUESTION IS SUBSTANTIAL

The question presented in this appeal is substantial in that the decision of this Supreme Court will serve to broader reach than the immediate purpose of rectifying the violation of Appellant's due process rights. In the long line of cases from Gelpcke v. City of Dubuque, 1 Wall 175, 17 L.Ed. 520 (1890) to Chevron Oil Company v. Huson, 404 U.S. 97 (1971), this Court has acted to repel different transgressions of rights occasioned by inappropriate instances of retroactivity. The Courts of this nation are served whenever this Court acts to deal with a new or another not well recognized question of retroactivity. Such is Appellant's case here where the decision of this Court will serve to give an answer in form of law and legal guideline whether one's property rights in his accrued cause of action is protected against the retroactive application of an overruling decision which changes the law from what it was when his cause of action accrued and his

property rights therein vested. What the decision of this Supreme Court of the United States will do to settle the federal questions involved renders it distinctively substantial.

CONCLUSION

The applicable law as enunciated by this Supreme Court in the cases set forth herein clearly demonstrates that barring Appellant's previously accrued cause of action by retroactively applying Pullum to Appellant's case violated Appellant's due process rights under the Fourteenth Amendment of the Constitution of the United States, and, accordingly, Appellant's petition should be granted.

Respectfully submitted,

Thomas T. Remington
THOMAS T. REMINGTON
Smith, Grimsley, Remington
& Kessler
Post Office Box 2379
Fort Walton Beach, FL 32549
904/243-8194

June 19, 1987

ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail this 19th day of June, 1987, to G. Jack Hardy, Esquire, 501 Northeast First Avenue, Miami, Florida 33132; John N. Boggs, Esquire, Post Office Box 1937, Panama City, Florida 32402; J. Dixon Bridgers, III, Esquire, Post Office Box 13010, Pensacola, Florida 32598; Thomas C. Schult, Esquire, 2600 Mutual Life Benefits Building, 2345 Grand Avenue, Kansas City, Missouri 64108; Gerald M. McGill, Esquire, 202 West Jackson Street, Pensacola, Florida 32501; John L. Myrick, Esquire, 625 North 9th Avenue, Pensacola, Florida 32501; Cathy B. Lerman, Esquire, Post Office Box 030067, Fort Lauderdale, Florida 33303-0067; Edward T. O'Donnell, Esquire, 200 South Biscayne Boulevard, Suite 4500, Miami, Florida 33131-2378; William Bissett, Esquire, 501 Northeast First Avenue, Miami, Florida 33132; Sharon Lee Stedman, Esquire, 11 East Pine Street, Orlando, Florida 32802.

Thomas T. Remington

THOMAS T. REMINGTON

In the

Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, et al, APPELLANTS

v.

THE FIRESTONE TIRE & RUBBER CO., etc., et al, APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX TO JURISDICTIONAL STATEMENT

THOMAS T. REMINGTON
Smith, Grimsley, Remington
& Kessler
P.O. Box 2379
Fort Walton Beach, FL 32549
904/243-8194
Attorney for Appellant

APPENDIX

TABLE OF CONTENTS

Page

Order of Supreme Court of Florida, March 27, 1987.....1a

Decision of District Court of Appeal, First District, Florida.....3a

Notice of Appeal to Supreme Court of the United States.....7a

Order United States District Court, George v. Firestone, 85-0117 MMP N.D. Fla. June 13, 1986 (Paul, J.).....12a

SUPREME COURT OF FLORIDA

Friday, March 27, 1987

Case No. 69,668

District Court of Appeal
First District No. BK-198

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY and SHARON CASSIDY as wife of KENNETH CASSIDY,

Petitioners,

v.

FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Respondents.
_____/

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under

Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, C.J., EHRLICH, SHAW and BARKETT, J.J., concur

OVERTON, J., dissents.

DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

September 23, 1986
Rehearing denied October 23, 1986

Appellants seek review of a summary final judgment entered in a products liability action for a 1982 injury, asserting that the court erred by applying section 95.031(2) Florida Statutes. We affirm the order appealed.

Section 95.031(2), Florida Statutes (1982),[1] provided that:

> Actions for products liability... must be begun...within 12 years after the date of delivery of the completed product to its original purchaser....

Appellants' action involves an injury which

---

1 The statute has since been amended. See Chapter 86-272, Laws of Florida (1986).

occurred more than twelve years after the allegedly defective product was delivered to the original purchaser, and the action was thus not begun within the period prescribed by section 95.031(2). Both the injury and the commencement of the action occurred subsequent to the Florida Supreme Court's decision in Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1981), that in those circumstances "section 95.031(2) denies access to courts under article I, section 21, Florida Constitution." However, after appellants' action was filed, the supreme court receded from Battilla and upheld the constitutionality of section 95.031(2) in Pullum v. Cincinnati, Inc., 476 So.2d 675 (Fla. 1985). As in the present case, in Pullum summary judgment was granted to bar a products liability action by application of section 95.031(2).

Appellants contend that Pullum should not be given effect in the present case, since appellants' action was filed after the decision in Battilla but prior to the decision in Pullum. However, appellants have shown no

substantial inequity or unfairness which would result upon application of the Pullum ruling, nor does the decision in Pullum suggest that it should be limited to prospective application.[2] As indicated in Florida Forest & Park Service v. Strickland, 18 So.2d 251 (Fla. 1944), decision overruling earlier precedent are generally given retroactive effect whereby judicial construction of a statute is deemed to relate back to the statute. Appellants have shown no cause to depart from this general rule

---

2 Appellants' only suggestion of reliance on Battilla is the financial cost of initiating litigation. This assertion does not encompass a detrimental change in legal position, and such financial reliance does not preclude application of the Pullum decision in the present case. We note also that in denying rehearing the supreme court in Pullum rejected a contention that the decision should not apply to a pending action.

in the present case.[3] We therefore determine that Pullum should be given effect and appellants' action is barred by section 95.031(2), Florida Statutes (1982).

The order appealed is affirmed.

---

3 Several cases in federal district court have addressed this issue with varying results. E.g. compare Eddings v. Volkswagenwerk, A.G., 635 F.Supp. 45 (N.D. Fla. 1986), and Lamb v. Volkswagewerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D. Fla. 1986), with George v. Firestone Tire and Rubber Co., Case No. GCA-85-0117-MMP (US SCN Fla., June 13, 1986), and Owens v. Firestone Tire and Rubber Co., Case No. 84-350-Civ-T-10 (U.S.D.C.M. Fla., Jan. 28, 1986)[Available on WESTLAW, DCTU Database

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

EFFIE DELL CASSIDY,
et al,

Plaintiffs,

v. Case No. 83-1934

THE FIRESTONE TIRE &
RUBBER CO., etc. et al,

Defendants.

ORDER

The above cause is before the Court on defendants' motions for summary judgment based on Pullum v. Cincinnati, Inc., etal, 10 FLW 429 (Fla. August 29, 1985). Upon consideration of arguments and briefs of counsel, the Court has concluded Pullum has retroactive application, and defendants are entitled to judgment as a matter of law. It is therefore,

ORDERED AND ADJUDGED that the motions of Defendants The Firestone Tire and Rubber Company, The Ford Motor Company and The

Budd Company for summary judgment are hereby granted.

DONE AND ORDERED at Pensacola, Escambia County, Florida, this 27th day of November, 1985.

M. C. Blanchard
CIRCUIT JUDGE

Copy hereof furnished to:
Thomas T. Remington, esq., P. O. Box 2379. Fort Walton Beach, FL 32549
John L. Myrick, Esq., 438 East Government Street, Pensacola, FL 32501
G. Jack Hardy, Esq., 501 NE First Avenue, Miami, FL 33132
John N. Boggs, Esq., P. O. Box 1637, Panama City, FL 32402
Gerald A. McGill, Esq., 801 North 12th Avenue, Pensacola, FL 32501
Thomas Schult, Esq., 2600 Mutual Benefits Life Building, 2345 Grand Avenue, Kansas City, MO 64108
J. Dixon Bridgers, III, Esq., P. O. Box 12426, Pensacola, FL 32582.

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v. No. 69,668

FIRESTONE TIRE AND RUBBER COMAPNY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy, Florida National Bank, as guardian of the property of Kenneth Cassidy, and Sharon Cassidy, as wife of Kenneth

Cassidy, the appellant above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida entered in this action on March 27, 1987, by denial of review.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 12th day of June, 1987, to G. Jack Hardy, Esq., 501 NorthEast First Avenue, Miami, Florida 33132, John N. Boggs, Esq., Post Office Box 1937, Panama City, Florida 32402, J. Dixon Bridgers, III, Esq., Post Office Box 13010, Pensacola, Florida 32598, Thomas C. Schult, Esq., 2600 Mutual Life Benefits Building, 2345 Grand Avenue, Kansas City, Missouri 64108, Gerald M. McGill, Esq., 202 West Jackson Street, Pensacola, Florida 32501, John L. Myrick, Esq., 625 North 9th Avenue, Pensacola, Florida 32501, Cathy B. Lerman, Esq., Post Office Box 030067, Fort Lauderdale, Florida 33303-0067, Edward T. O'Donnell, Esq., 200 South Biscayne

Boulevard, Suite 4500, Miami, Florida 33131-2378, William Bissell, Esq., 501 Northeast First Avenue, Miami, Florida 33132, and to Sharon Lee Stedman, Esq., 11 East Pine Street, Orlando, Florida 32802.

THOMAS T. REMINGTON
Smith, Grimsley, Remington
& Kessler
P. O. Box 2379
Fort Walton Beach, FL 32549
904/243-8194

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THOMAS L. GEORGE and
TOMMIE GEORGE, his wife,

Plaintiffs,

v. Case No.
GCA 85-0117-MMP

FIRESTONE TIRE &
RUBBER CO., etc. etal,

Defendants.

ORDER

This cause comes before the Court upon numerous inter-related pretrial motions. First, the plaintiffs move to dismiss/strike (doc 43) the fourth and fifth affirmative defenses asserted in defendant Firestone's answer to plaintiff's amended complaint (doc 42). The fourth affirmative defense is that "plaintiffs' amended complaint is barred by Section 95.031(2) of the Florida Statutes in that the subject multi-piece truck wheel was delivered to the original

purchaser more than twelve (12) years before the filing of this action." The fifth affirmative defense is simply that "plaintiff's claims are barred by the applicable statutes of limitation." Also pending before the Court are defendants' motions (doc 44 and 47) for summary judgment based on the bar of the statute of repose, Fla. Stat. §95.031(2). Finally, defendant Budd has filed a motion for leave to amend its answer to include the statute of limitations defense (doc 51).

Defendant Firestone has asserted an affirmative defense based on "the applicable statute of limitations". The proposed amended answer is identical in this respect. No specific limitations period or provision is recited. Plaintiffs' complaint was filed April 10, 1985. The complaint states that plaintiff was injured on March 2, 1982 when the multi-piece wheel rim manufactured by defendants exploded. Fla. Stat. §92.11 provides that such as this must be commenced within four years. Plaintiffs have indis-

putably filed within the time allowed under Florida's statute of limitations. There being no dispute over these essential facts, plaintiffs' motion to dismiss/strike Firestone's fourth affirmative defense is GRANTED.

There remains the more difficult question of the applicability of the statute of repose. A statute of repose differs significantly from a statute of limitation. As the Court stated in Lamb v Volkswagenwerk Aktiengesell Schaft, 631 F. Supp. 1144, 1147 (S.D. Fla., 1986), "[W]hile in the most general sense statutes of repose and statutes of time limitation are similar in that they prescribe the periods within which actions may be brought we think there are critical analytical distinctions between the two and we do not use the terms interchangeably here".

A statute of limitation serves the salutory purposes of promoting diligence and preventing the prosecution of stale claims. Nardone v Reynolds, 333 So.2d 25, 36 (Fla. 1976) ("The purposes of the stat-

utes of limitations are to protect defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution.") Within a certain amount of time after one's cause of action accrues, one must institute proceedings or be barred by the statute of limitations.

In an action founded on negligence, one's cause of action accrues at the moment in time when one is injured as a result of the negligence. (An exception based on belated discovery of an injury is not pertinent here.) "Where a claim for redress is based upon negligent injury to person or property, the cause of action accrues when there has been a negligent act with proximately resulting injury or damage. The careless act itself is not enough to give rise to a cause of action; there must also be consequential injury or damage." Rosenberg v Town of North Bergen, 293 A.2d 662,666 (N.J. 1972); cf. Coombs v Getz,

285 U.S. 434, 442 (1932) (cause of action under term of contract incorporating statutory provision arose upon the creation of contractual liability, not upon the passage of the Rule of Law); Shearn v Orlando Funeral Home, 88 So.2d 591, 593 (Fla. 1956) ("[A] cause of action is the right which a party has to institute a judicial proceeding."); Luckie v McCall Mfg. Co., 153 So.2d 31 (Fla. 1st DCA 1963) (cause of action accrues at the time and place when injury occurs and damage results.)

Unlike a statute of limitations, which does not begin to run until one's cause of action accrues, the time period of a statute of repose runs without reference to when one's cause of action accrued. The statute of repose begins running when the product is delivered or the work is completed. Thus, if one is injured on a date after expiration of the period of time established in the statute of repose, one's cause of action never accrues. As explained by the Florida Supreme Court, "[R]ather than establishing a time limit within which action must be brought, measured from the time of

accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right." Bauld v. J.A. Jones Constr. Co., 357 So.2d 401, 402 (Fla. 1978); but see, Berry v Cessna Aircraft Corp., 717 P.2d 678 (Utah 1985) (rejecting analysis that statute of repose prevents a cause of action from accruing when one is not injured until after the time has run).

It is not disputed in this case that if the statute of repose had been fully effective at the time of plaintiff's injury, plaintiff would have been without redress. The statute of repose would have run before plaintiff was injured and would have cut off plaintiff's right of action before his cause of action accrued. But in Battilla v Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980) (products liability action) and in Overland Construction Co. v Sirmons, 369 So.2d 572 (Fla 1979) (action based on

design, planning or construction of improvements to real property) the Florida Supreme Court held that it worked an unconstitutional denial of access to courts when the statute of repose acted as an absolute bar to a cause of action of one not injured until after expiration of the period of repose. After those cases, the statute of repose remained on the books with limited force and effect. The statute of repose was null and void insofar as the causes of action of persons injured after the period expired. As for those injured less than the prescribed period of time after delivery of the product or completion of the work, the statute of repose operated as sort of hybrid statute of limitation. One injured by a product less than twelve years from delivery of that product had the lesser of four years from when the cause of action accrued or twelve years from the date of delivery of the product in which to file suit. Yet a third time computation was required if the amount of time one had in which to file was not a "reasonable" amount of time after the cause of action accrued, as for example, when one

is injured three days before the expiration of the twelve year period. See Universal Engineering Corp. v Perez, 451 So.2d 463 (Fla. 1984); MacRae v Cessna Aircraft Co., 457 So.2d 1093, 1094 (Fla. 1st DCA 1984).

Years passed; years in which the statute of repose had only limited force and effect; years in which plaintiff was injured and filed his complaint. Then, in Pullum v Cincinnati, Inc., 476 So.2d 657 (Fla 1985) the Florida Supreme Court suddenly receded from Battilla and held that the statute of repose did not unconstitutionally prevent access to courts by persons injured more than twelve years after delivery of a product. The question now before this Court is whether Pullum is to be applied retroactively to bar plaintiffs' cause of action.

Jurisdiction of this case is predicated on diversity, therefore under Erie Railroad Co. v Tompkins, 304 U.S. 64 (1938) this Court is bound to follow Florida law in determining whether or not Pullum has retroactive application. Thorsby v

Williams-White & Co., case no. TCA 84-7230-WS (N.D. Fla. Jan. 30, 1986). In the seminal case, Florida Forest and Park Service v Strickland, 154 Fla. 472 (18 So.2d 251 (1944), the Florida Supreme Court explained the law governing retroactive application of a judicial decision overturning a former decision. Generally, the later decision will be applied both prospectively and retrospectively, unless one of two possible exceptions applies. The first exception is when the decision is expressly declared to have only prospective effect. The second exception is "that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation". Strickland, 154 Fla. at ___, 18 So.2d at 253.

Plaintiff has indeed acquired a property right which would be destroyed by retrospective operation of Pullum. During

the dormancy of the statute of repose, between Battilla and Pullum, plaintiff's cause of action accrued. An accrued cause of action must be carefully distinguished from the sort of generalized right to sue possessed by one who had not yet been injured, one merely has a non-vetsed right to sue which can be legislatively withdrawn. See, e.g., Ducharme v Merrill-National Laboratories, 574 F.2d 1307 (5th Cir. 1978) (cause of action against manufacturer did not arise until after passage of Swine Flu Act; in the absence of a prior vested right in a cause of action, due process not violated by statutory abrogation of the tort claim); cf. State v White, 194 So.2d 601 (Fla. 1967) appellant had no vested right in statute which provided exemption under which he operated his business; legislature could and did repeal that exemption. However, where a court had held the repealing legislation unconstitutional and plaintiff carried on his operations pursuant to that decision, the current decision holding the repealing legislation

constitutional would not be applied retroactively against appellant). An accrued cause of action, on the other hand, is a species of property protected by the due process clause, of which plaintiff may not be deprived by retroactive application of Pullum. See Logan v Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's due process clause."); Coombs v Getz, 285 U.S. 434, 442 (1932) ("[N]either vested property rights nor the obligation of contracts of third persons may be destroyed or impaired... The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right...) to enforce his cause of action upon the contract."); Brinkerhoff-Faris Trust & Savings Co. v Hill, 281 U.S. 673 (1930) (state Supreme Court held statute unconstitutional, plaintiff proceeded under that rule of law. Later decision of state Supreme Court reversing and holding

statute constitutional could not be retroactively applied to bar plaintiff's cause of action because plaintiff would thereby be deprived of property without due process. "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid. . . state statute. . ") (citations omitted); Ettor v Tacoma, 228 U.S. 148, 155-56 (1913) ("The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. . .The right of the plaintiffs in error was fixed by the law in force. When their property was damaged for public purposes and the right so vested cannot be defeated by subsequent legislation.") (emphasis added); Pritchard v Norton 106 U.S. 124

132 (1882) ("Hence it is that a vested right of action is property in the same sense in which tangible things are property and it is equally protected against arbitrary interference."); Hartford Fire Insurance Co. v Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1367 (6th Cir. 1984) (distinguishing between "cause of action" generally speaking and "accrued causes of action", holding the former may be abolished by legislative action, as when a statute of repose prevents a cause of action from accruing by running before one is injured); Keller v Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971) ("While conceding that one can have no vested interest in any rule of common law, these cases emphasized that a right created under such a rule which has been perfected could not be taken away without being violative of the Fifth and Fourteeneth Amendments"); Mitchell v Doggett, 1 Fla. 356, 371-72 (1847) (distinguishing between rights which may legislatively be altered and vested rights which cannot be affected by retroactive application of a change in the law, Florida

Supreme Court held that the law in effect at the time the parties entered into their contract conveyed rights on them which then vested and could not be changed by repeal of the law); Berry v Beech Aircraft Corp., 717 P.2d 678 (Utah 1978) (discussing constitutionality of statute of repose, Utah Supreme Court noted that an accrued cause of action is a vested property right of which one cannot be deprived without due process).

Division of Workers Comp. v Brevda, 420 So.2d 887 (Fla. 1st DCA 1982), cited in Lamb, is not contrary to the authorities cited above. In Brevda the Court held that a statute entitling prevailing parties to an award of attorney's fees was a non-vested right until such time as one became a prevailing party by entry of judgment. The holding that no right to fees vested until one prevailed has nothing whatsoever to do with the question whether an injured party has a vested right to sue as of the time the cause of action accrued.

Based on all the foregoing, this Court concludes that plaintiff's cause of action validly accrued and became vested when plaintiff was injured. That accrued cause of action is a property right. The law of Florida, as expressed in Strickland, is that it is not proper to apply a judicial decision retroactively if doing so would deprive plaintiff of a property right. Furthermore, retroactive application of Pullum to bar plaintiff's previously accrued cause of action would plainly violate plaintiff's federal due process rights. Thus, under both Florida and Federal law, this Court can not, should not and will not apply Pullum retroactively to extinguish plaintiff's accured cause of action.

Accordingly,

1. Plaintiffs' motion to dismiss/strike defendant Firestone's fourth and fifth affirmative defenses is GRANTED.

2. Defendant Budd's motion to amend answer to add affirmative defenses virtually identical to Firestone's fourth and fifth affirmative defenses is DENIED AS MOOT.

3. Defendant's motions for summary judgment based on the statute of repose are DENIED.

DONE AND ORDERED this 13th day of June, 1986.

Maurice M. Paul
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUL 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-2041

In The

Supreme Court of the United States

October Term, 1987

—o—

EFFIE BELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

—o—

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

—o—

MOTION OF APPELLEE FORD MOTOR COMPANY TO DISMISS OR AFFIRM

—o—

GARY E. SOUTHWORTH
SOUTHWORTH & MCGILL, P.A.
202 West Jackson Street
P. O. Drawer 13046
Pensacola, Florida 32501
(904) 432-6000

Attorneys for Appellee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

The Appellee, FORD MOTOR COMPANY, (hereinafter referred to as "FORD") disagrees with the framing of the question presented by the Appellant, EFFIE DELL CASSIDY, ET AL (hereinafter "CASSIDY"). FORD submits that the questions actually presented in this cause are as follows:

1. Whether or not the Appellant has presented any federal question for review by this court;

2. Even if a federal question has been presented by the Appellant, whether a substantial federal question is involved in this cause.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT I	4
The Appellant Has Not Presented Any Federal Question for Review	
ARGUMENT II	9
Even If A Federal Question Has Been Presented By The Appellant, No Substantial Federal Question Is Involved In This Cause.	
CONCLUSION	10

TABLE OF AUTHORITIES

Pages

CASES

Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980) 2, 3, 5, 6, 7, 8

Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) 3, 4, 6, 8, 9

Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n.63 (1983) 8

Pullum v. Cincinnati, Inc., 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986) 9

OTHER AUTHORITIES

28 U.S.C. Section 1257(2) 2

Fla. Stat. (1975) Sec. 95.031(2) 2, 4, 5, 6, 7

No. 86-2041

In The
Supreme Court of the United States
October Term, 1987

EFFIE BELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF APPELLEE FORD MOTOR COMPANY TO DISMISS OR AFFIRM

Appellee, FORD MOTOR COMPANY (hereinafter FORD) moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the court of the District Court of Appeal, First District, State of Florida on the grounds that it is manifest either that no federal

question exists to be reviewed by this court or that the federal question involved is not substantial.

STATUTORY PROVISION INVOLVED

The Appellant CASSIDY attempts to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257 (2). Although the basis for jurisdiction is not set out in the Jurisdictional Statement, Appellant presumably relies upon that portion of 28 U.S.C. Section 1257(2) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . . By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

STATEMENT OF THE CASE

In 1975, the Florida Legislature enacted Section 95.03 (2), Florida Statutes (1975), which provided that actions for product liability must be begun within twelve (12) years after the date of delivery of the completed product to its original purchaser regardless of the date the defect in the product was or should have been discovered.

In 1980 the Florida Supreme Court in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980)

declared the twelve year statute of repose contained in Section 95.03(2), Florida Statutes (1975) to be unconstitutional as violating the access to courts provision of Article I, Section 21, of the Florida Constitution.

In 1985 the Florida Supreme Court reconsidered its decision in *Battilla* in a case styled *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985). In its opinion the Supreme Court noted that

> The trial court granted summary judgment against Pullum on the basis that his action was barred by Section 95.031(2) Florida Statutes (1979).

Continuing along in the *Pullum* decision the Florida Supreme Court stated:

> We have reconsidered our decision in *Battilla* wherein we expressly held:
>
> > The circuit court held that this product liability action was barred by the statute of limitations, Section 95.031, Florida Statutes (1975). We reverse on the authority of *Overland Construction Co. v. Simmons*, 369 So.2d 572 (Fla. 1979), and hold that, as applied to this case, Section 95.031 denies access to courts under Article I, Section 21, Florida Constitution. (Citations omitted.)
>
> 392 So.2d at 874. We recede from this decision and hold that Section 95.031(2) is not unconstitutionally violative of Article I, Section 21 of the Florida Constitution. The legislature, in enacting this statute of repose reasonably decided that perpetual liability places an undue burden on manufacturers, and it decited that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product.

Based upon the *Pullum* decision, Firestone, Budd and Ford each filed Motions of Summary Judgment in the trial court, which motions were granted.

The Appellant here, CASSIDY, appealed the summary judgment granted in the trial court to the District Court of Appeal, First District, State of Florida which affirmed the judgment for Appellees rendered in the trial court below. Subsequently, the Florida Supreme Court denied the Appellants Petition for Review.

The accident involving Appellant, KENNETH CASSIDY, occurred on February 6, 1982. KENNETH CASSIDY was injured by the separation of a multi-piece rim wheel which all parties have agreed was delivered to the original purchaser more than twelve (12) years prior to KENNETH CASSIDY'S injury.

———o———

ARGUMENT

I.

THE APPELLANT HAS NOT PRESENTED ANY FEDERAL QUESTION FOR REVIEW.

The basic issue in this case is whether or not the CASSIDYS' cause of action was barred by the clear wording of Section 95.031(2), Florida Statutes (1975) which provides in part:

> (2) Actions for products liability and fraud under s.95.11(3) must be begun within the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of

> running from any date prescribed elsewhere in s.95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

The facts are clear and admitted by all parties that KENNETH CASSIDY was injured by the separation of a multi-pieced rim wheel which was delivered to the original purchaser more than twelve (12) years prior to his injury. Clearly if Section 95.031(2), Florida Statutes (1975) is applicable to this case then CASSIDYS' action was barred at the time the injury occurred. The only reason that the Appellants were able to file suit in the instant case was a ruling by the Florida Supreme Court in *Battilla v. Allis Chalmers Manufacturing Company,* 392 So.2d 874, (Fla. 1980) which held that as applied to the facts in the *Battilla* case, Section 95.031(2) denied access to the courts under Article I, Section 21 of the Florida Constitution. The effect of the *Battilla* decision was to hold in abeyance the provisions of Section 95.031(2), Florida Statutes (1975), effectively removing the twelve (12) year period after which product liability suits could not be brought. Significantly, Florida Statutes Section 95.031(2) was neither repealed nor modified by the Florida Legislature but was subsequently re-enacted even in the face of the *Battilla* decision. Therefore, but for the effect of the *Battilla* decision holding the statute of repose in abeyance, KENNETH CASSIDY would not have been able to file his suit as he did in 1982 in that it would have been barred by the twelve year statute of repose.

In 1985 the Florida Supreme Court reconsidered the decision in *Battilla* in the case styled *Pullum v. Cincinnati, Inc., supra.* The Florida Supreme Court stated that they had reconsidered their decision in *Battilla* where they had expressly held that Section 95.031 denied access to the courts under Article I, Section 21 of the Florida Constitution. The court in *Pullum,* supra then went on to say:

> We recede from this decision and hold that Section 95.031(2) is not unconstitutionally violative of Article I, Section 21 of the Florida Constitution. The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product.

The effect of the *Pullum* decision was to reinstate the the twelve year statute of repose for product liability actions contained in Section 95.031(2) Florida Statutes (1975). Subsequent to the publication of the *Pullum* decision the Appellees filed a Motion for Summary Judgment in the trial court on the basis that the instant claim was barred by the twelve year statute of repose as set out in Section 95.031(2) Florida Statutes. The trial court granted the Motions for Summary Judgment.

For purposes of Appellant's Jurisdictional Statement it is important to recognize that the decision in *Battilla, supra* which held Section 95.031(2) Florida Statutes (1975) to be unconstitutional was based solely upon provisions contained under Article I, Section 21 of the Florida Constitution. No federal constitutional basis was asserted.

When *Battilla* was reconsidered by the Florida Supreme Court in *Pullum, supra* the decision was clearly

based on the opinion of the Supreme Court of Florida that Section 95.031(2) is not unconstitutionally violative of Article I, Section 21 of the Florida Constitution. Again, no reference is made to nor is any decision of the Florida Supreme Court based upon the Constitution of the United States. Admittedly, the Florida Supreme Court has changed its opinion as to whether or not the twelve (12) year statute of repose violates provisions of the Florida Constitution, but this is a decision which the highest Court of a state can and must make in the interpretation of that State's Constitution.

Although it is difficult to ascertain precisely how the Appellants feel that they have raised a federal question in their jurisdictional statement it is apparent throughout that they have not challenged the constitutionality of Section 95.031(2) Florida Statutes (1975) either pursuant to the Florida Constitution or the Constitution of the United States. Instead, the jurisdictional statement appears to proceed on the theory that since they had been allowed to file a lawsuit due to the application of *Battilla*, they should be allowed to proceed with the case to conclusion regardless of any reconsideration of the wisdom or lack of wisdom of the *Battilla* decision. This ignores the inescapable fact that but for the decision in *Battilla* which prevented the operation of Section 95.031(2) Florida Statutes from barring KENNETH CASSIDY'S action at the time of occurrence, there would have been no basis for CASSIDY'S claim as it would have been time barred. Arguing that KENNETH CASSIDY had the right to rely on *Battilla* and that this became a vested right which could not be taken away by the subsequent reinstatement or reactivation of Section 95.031(2) Florida Statutes by the de-

cision in *Pullum*, is an attempt by CASSIDY both to have his cake and eat it too. In short, CASSIDY wants to be able to take advantage of and rely upon the Florida Supreme Court's decision in *Battilla* so that he could file suit, but he does not wish to accept the consequences of the subsequent decision of the Florida Supreme Court in *Pullum* which would allow the provisions of Section 95.031(2) Florida Statutes to bar his cause of action at the time that the accident occurred.

A review of the opinion of the First District Court of Appeal, State of Florida, which is attached to the appendix of the Appellant's jurisdictional statement makes clear that the decision in the instant case has been based solely upon Florida law. Nothing in the decision indicates that the First District considered or resolved in any fashion CASSIDY'S claim under the Fourteenth Amendment to the United States Constitution. This is significant in that when the highest court of the state from which review may be obtained fails to pass on a federal question it is presumed that the omission is due to a lack of proper presentation of the Constitutional issue. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.63 (1983). Although this presumption can be rebutted in proper cases, the Appellant has made no such showing in his jurisdictional statement.

Consequently, in view of the fact that the Appellant failed to challenge the applicable Florida Statute, both at the trial level and at the appellate level, there exists no federal question to be reviewed by this Honorable Court.

———o———

ARGUMENT

II.

EVEN IF A FEDERAL QUESTION HAS BEEN PRESENTED BY THE APPELLANT, NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CAUSE.

The issue of law raised in the Appellant's jurisdictional brief presents no substantial federal question for consideration by this court. Appellant asserts that the retroactive application of the Florida Supreme Court decision in *Pullum v. Cincinnati, Inc.* somehow destroyed CASSIDY'S property right in an accrued cause of action and thereby violated his federal due process rights under the Fourteenth Amendment to the United States Constitution. However, any such argument would seem to turn upon the validity of the decision of the Florida Supreme Court in *Pullum v. Cincinnati, Inc.* This court has already dismissed an appeal in the *Pullum v. Cincinnati, Inc.* case finding no substantial federal question. 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986). It is respectfully submitted that there is no way to distinguish the instant case from that of *Pullum v. Cincinnati, Inc.*, and that there is no substantial federal question contained in the instant case which would differ significantly from *Pullum v. Cincinnati, Inc.*

A further reason why any federal question contained in this case is not substantial can be found at page four of the Appellant's jurisdictional statement in which he notes that in 1986 the Florida State Legislature repealed the twelve (12) year statute of repose. Therefore, any questions resolved by *Pullum* will not be involved in future cases.

As a result of the above it is apparent that even if there is a federal question involved the question is not substantial and is limited to the facts presented in the underlying opinion.

———o———

CONCLUSION

For the foregoing reasons the Appellee's Motion to Dismiss the appeal herein or in the alternative to affirm the judgment of the First District Court of Appeal of the State of Florida should be granted.

Respectfully submitted,

GARY E. SOUTHWORTH
SOUTHWORTH & MCGILL, P.A.
202 West Jackson Street
P. O. Drawer 13046
Pensacola, Florida 32501
(904) 432-6000

Attorneys for Appellee

Supreme Court, U.S.
FILED
JUL 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-2041

In The

Supreme Court of the United States

October Term, 1986

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF APPELLEE THE BUDD COMPANY TO DISMISS OR AFFIRM

ROBERT W. PASS
CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A.
25 West Cedar Street
Harbourview Building, 4th Floor
Post Office Box 12426
Pensacola, Florida 32582
(904) 434-0142
Attorneys for Appellee

July 20, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether the State's intermediate appellate court's determination under state law principles to apply a State Supreme Court decision retroactively is correct under state law.

PARTIES TO PROCEEDINGS BELOW

Appellee, THE BUDD COMPANY (hereinafter referred to as "BUDD") has no correction to the listing by Appellants of the parties to the proceedings below. In compliance with Sup. Ct. R. 28.1, BUDD states that Thyssen, A.G. is the parent company of BUDD and Budd of Canada is a subsidiary which is not wholly owned by BUDD.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDINGS BELOW	i
RESPONSE TO STATEMENT OF THE GROUNDS	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	3
I. This Court Has No Jurisdiction Over This Appeal as the Validity of the State Statute Was Not Properly Drawn in Question on Federal Grounds.	3
II. This Case Presents No Substantial Question Not Previously Decided by This Court.	7
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Acton II v. Fort Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982), *affirmed*, 440 So.2d 1282 (Fla. 1983) 6

Battilia v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980) 2, 3

Beaty v. Richardson, 276 U.S. 599 (1928) 6

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451 (1930) 9

Callan v. Bransford, 139 U.S. 197 (1891) 5

Cardinale v. Louisiana, 394 U.S. 437 (1960) 4

Central Union Co. v. Edwardsville, 269 U.S. 190 (1925) 4

City of Miami v. Steckloff, 111 So.2d 446 (Fla. 1959) 6

Coombs v. Getz, 285 U.S. 434, 52 S.Ct. 435 (1933) 9

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620 (1978) 8

Ettor v. Tacoma, 228 U.S. 148 (1913) 9

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 5

Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944) 10

Higbee v. Housing Authority of Jacksonville, 143 Fla. 560, 197 So. 479 (Fla. 1940) 6

Hill v. California, 401 U.S. 797 (1971) 4

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) 5

Linkletter v. Walker, 381 U.S. 629, 85 S.Ct. 1731 (1965) 8

Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148 (1982) 9, 10

TABLE OF AUTHORITIES—Continued

Page

Martinez v. California, 444 U.S. 277, 100 S.Ct. 553 (1980) 10

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 4

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 5

Nelson v. Seldon Cypress Door Co., 83 So.2d 86 (Fla. 1919) 6

Osborne v. Clark, 204 U.S. 565, 27 S.Ct. 319 (1907) 5

Pritchard v. Norton, 106 U.S. 124, 1 S.Ct. 102 (1882) 9

Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) *appeal dismissed*, 106 S.Ct. 1624, 90 L.Ed. 2d 174 (1986) 3, 7, 8, 9, 10, 11

Southern Bell Telephone and Telegraph Co. v. Bell, 116 So.2d 617 (Fla. 1959) 5

Sullivan v. Texas, 207 U.S. 416 (1908) 5

U.S. v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801) 10

STATUTES

28 U.S.C. Section 1257 2

28 U.S.C. Section 1257(2) 3

28 U.S.C. Section 1257(3) 3

Section 95.031(2), Florida Statutes (1975) 2, 4

CONSTITUTIONS

Article I, Section 21, Florida Constitution 3

Article V, Section 3(b), Florida Constitution (1980) 4

Fourteenth Amendment, United States Constitution 8, 11

No. 86-2041

In The

Supreme Court of the United States

October Term, 1986

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION OF APPELLEE THE BUDD COMPANY TO DISMISS OR AFFIRM

RESPONSE TO STATEMENT OF THE GROUNDS

Pursuant to Rule 16 of the Rules of the Court, Appellee BUDD moves this Court to dismiss the appeal herein on the grounds that the federal question to be reviewed was not properly raised in or decided by the state courts and that the appeal does not present a substantial

federal question, Sup.Ct. R. 16.1(b), or, in the alternative, to affirm the judgment of the First District Court of Appeal of the State of Florida on the ground that "it does not present a substantial federal question." *Id.*

———o———

STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. Section 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, maybe reviewed by the Supreme Court as follows
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

———o———

STATEMENT OF THE CASE

Appellants' action is a product liability suit involving an injury which occurred more than twelve (12) years after the alleged defective product was delivered to the original purchaser. The pertinent dates are as follows. In 1975, the Florida Legislature enacted Section 95.031(2), Florida Statutes (1975), providing that actions for products liability must be begun within twelve (12) years after the date of delivery of the completed product to its original purchaser. In 1980, the Florida Supreme Court in *Battilia v. Allis Chalmers Manufacturing Co.*,

392 So.2d 874 (Fla. 1980) held that this twelve year statute of repose violated the access to courts provision of Article I, Section 21, of the Florida Constitution. The injury here occurred on February 6, 1982, after the decision in *Battilia,* but more than twelve years after the delivery of the product to the original purchaser. After this action was filed and before any trial on the merits, the Florida Supreme Court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985), receded from *Battilia* and upheld the constitutionality of the statute of repose. The BUDD COMPANY, a defendant, filed a motion in the state trial court for summary judgment based upon this statute of repose and prevailed. The First District Court of Appeal affirmed finding that there was no cause to depart from the general rule that a decision overruling earlier precedent is generally given retroactive effect. The Florida Supreme Court denied Appellants' petition for discretionary review.

———o———

ARGUMENT

I.

This Court has no jurisdiction over this appeal as the validity of the State statute was not properly drawn in question on federal grounds.

Appellants have invoked this Court's jurisdiction under 28 U.S.C. Section 1257(2). In order to establish the jurisdiction of this Court under either appeal or certiorari, the validity of the State statute must be drawn in question on the grounds that the statute is repugnant to the Constitution, treaties or laws of the United States. 28 U.S.C. Section 1257(2) and (3). This appeal is not prop-

erly within the jurisdiction of this Court because Appellants failed to properly challenge the validity of the twelve year statute of repose (Section 95.031(2), Florida Statutes) before the state courts on federal constitutional grounds.

It is essential to this Court's jurisdiction that the federal question be properly raised in the state court proceedings. *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969). A federal claim cannot be considered by this Court unless it has been raised in the state court or considered and resolved by the state court. *See McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434 (1940); *Hill v. California,* 401 U.S. 797, 805 (1971). The proper method for raising a Federal question is dependent upon the particular state's practice. *See Central Union Co. v. Edwardsville,* 269 U.S. 190 (1925).

This appeal was filed from the "decision" of the Supreme Court of the State of Florida. As evidenced by Appellants' brief, the Florida Supreme Court merely denied a petition for review filed under Article V, Section 3(b), of the Florida Constitution (1980). The appeal filed by Appellants in the Florida Supreme Court was filed pursuant to Article V, Section 3(b)(3), which provides:

> The Supreme Court *may* review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or Federal Constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. (Emphasis added.)

Accordingly the Supreme Court's decision to review this matter was discretionary and the denial of review is not a decision on the merits.[1] *See Southern Bell Telephone and Telegraph Co. v. Bell*, 116 So.2d 617, 619 (Fla. 1959). Thus, it is the First District Court of Appeal's decision which must be reviewed to determine whether the validity of the State statute was properly drawn in question.

A review of the decision of the First District Court of Appeal, which decision is contained in the appendix to Appellants' jurisdictional statement, makes clear that the First District did not consider or resolve in any fashion the federal constitutional claim that Appellants pose before this Court. The decision is based *solely* on State law.[2] When the highest court of the State from which review may be obtained fails to pass on a federal question, it is presumed that the omission was due to want of proper presentation. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.6 (1983). This presumption is fully sub-

---

[1] As the Florida Supreme Court decision did not pass on the merits of the case, the present appeal should have been filed, if at all, from the decision of the intermediate state appellate court —the First District Court of Appeal of the State of Florida. *Sullivan v. Texas*, 207 U.S. 416 (1908); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968); and *Callan v. Bransford*, 139 U.S. 197 (1891).

[2] The First District cites several federal court cases in footnote 3 of its opinion. This citation, however, was merely to demonstrate that courts have been reaching varying results as to retroactive application of *Pullum*. In any event, a mere passing reference to federal cases does not invoke this Court's jurisdiction. For example, in *Osborne v. Clark*, 204 U.S. 565, 27 S.Ct. 319, 320 (1907), this Court noted that the mere citation to this Court's decisions was not sufficient to raise a federal question.

stantiated in the present appeal as Appellants' initial and reply briefs to the First District Court of Appeal contain no reference to the United States Constitution nor any reference, even by implication, to the federal issue. *See* Appendix. Thus, it is clear that Appellants did not properly raise the Federal question before the First District Court of Appeal nor did the court resolve the issue.[3]

The Appellants did assert a federal issue before the trial court but this is not sufficient under Florida law to preserve the issue. Florida law provides that the failure to brief an issue on appeal is deemed an abandonment of that issue, *City of Miami v. Steckloff,* 111 So.2d 446, 447 (Fla. 1959). Appellants attempted to raise a federal issue as grounds for the petition for rehearing before the First District Court of Appeal. Florida law, however, is equally clear that raising an issue for the first time in a motion for rehearing before an appeal court waives the issue. *Nelson v. Seldon Cypress Door Co.,* 83 So. 86 (Fla. 1919).

Accordingly, the failure of Appellants to properly raise and preserve the issue presented by this appeal during the state appellate process defeats this Court's appeal jurisdiction. *Beaty v. Richardson,* 276 U.S. 599 (1928).

---

[3] Although the Amicus Brief before the First District Court of Appeal did not attempt to raise a federal question, the law in Florida is that an Amicus may not raise constitutional issues which have not been raised by the appellant and that any such argument is not considered by the appeal court. *Action II v. Fort Lauderdale Hospital,* 418 So.2d 1099, 1100-1101 (Fla. 1st DCA 1982), *affirmed,* 440 So.2d 1282 (Fla. 1983), and *Higbee v. Housing Authority of Jacksonville,* 143 Fla. 560, 197 So. 479, 485 (Fla. 1940).

Wherefore, BUDD respectfully requests that this Court dismiss Appellants' appeal for lack of jurisdiction.[4]

II.

The case presents no substantial question not previously decided by this Court.

Without conceding in any measure BUDD's position that this appeal is not subject to the jurisdiction of this Court, BUDD now shows that in any event this matter does not present a substantial federal question.

At the outset, it should be noted that this is not a case of far reaching implications. The statute in issue has been repealed by the Florida Legislature. This is a peculiar case which arose only because of a flux in the decisional law of the State of Florida during less than a five year period. Appellants' claim was barred under the twelve year statute of repose before it arose. Appellants assert an entitlement to bring suit notwithstanding that bar because the injury at issue occurred *after* the Florida Supreme Court first ruled on the constitutionality of that bar under state law but *before* the Florida Supreme Court finally decided in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), that the twelve year bar passes muster under the state constitution. Appellants contend that they must get the benefit of the earlier ruling but the federal constitution precludes the retrospective application of the latter ruling. The short answer to this contention is that, "[t]he Constitution neither *prohibits* nor requires retrospective effect. As Justice Cardoza said, 'We think the

---

[4] This is not a proper appeal in any event. Even on state law grounds, Appellants did not challenge below the validity of any state statute, but simply the retrospective application of a state Supreme Court decision.

Federal Constitution has no voice upon the subject.' " *Linkletter v. Walker,* 381 U.S. 629, 85 S.Ct. 1731, 1737 (1965).

In essence, Appellants assert that the retroactive application of the Florida Supreme Court decision of *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985), destroyed Appellants' property right in an accrued cause of action and thereby violated his federal due process rights under the Fourteenth Amendment to the United States Constitution. It is especially clear here that this argument is without merit because, as this Court has held, there is no vested property right in a pending tort claim:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of common law.' *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object, *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that 'otherwise settled' expectations may be upset thereby. *Usury v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16, 96 S.Ct. 2882, 2829, 49 L.Ed. 2d 752 (1976) . . . Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the Courts.

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 2638 n.32 (1978). As there is no vested property right in a pending tort claim there is no merit to Appellants' challenge under the Fourteenth Amendment.

The decisions of this Court cited in Appellants' brief are not on point. Those cases either involve parties' attaining a property right by actions other than the mere filing of a lawsuit or they address the question of what

procedures a State must afford a party who has a recognizable cause of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1156 (1982) and *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453 (1930). For example, *Coombs v. Getz*, 285 U.S. 434, 52 S.Ct. 435 (1933), specifically noted that the property right of the party there was not based solely upon the repealed statute but arose from the contractual liability incurred by the party in reliance upon the statute. The Court noted that upon the incurring of the contractual liability the party immediately acquired a right which existed independently and survived the abolition of the statutory provision which gave it birth. *Id.* at 436. *Ettor v. Tacoma*, 228 U.S. 148, 155-156 (1913), involved rights vesting because of changes to real property made in reliance upon a statute. In the cases cited by Appellants because the rights had "vested" in real property, a contract[5] or otherwise in *reliance* upon a statute, those rights were found to stand independent of the statute that created them and could not be abridged by a subsequent statute. Appellants' situation is quite different. Appellants did not acquire any contract or property rights in reliance upon or independent of the overruled decision. Accordingly, Appellants have no constitutional right to preclude retroactive application of the *Pullum* decision notwithstanding

---

[5] *Pritchard v. Norton*, 106 U.S. 124, 132-133, 1 S.Ct. 102, 108-109 (1882) merely states that a vested right of action is in property interest. It does not define when a right of action becomes vested. The Court notes, "A vested right to an existing defense is equally protected saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice."

that the decision sustains the viability of a statute that extinguishes their claims.[6]

In addition, Appellants can have no greater property interest in their tort claim than is established by Florida law. The nature and scope of any interest in a pending tort claim is as defined by Florida law. Under Florida law, a judicial decision overruling earlier precedent is generally given retroactive effect whereby judicial construction of the statute is deemed to relate back to the statute. *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944). So, too, this Court has held that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to prior law. *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 44 (1801). Assuming *arguendo* that Appellants had a property interest in their claim, that interest was not vested as against subsequent judicial modification.

In *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 557 (1980), this Court noted the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, but that an exception exists to the federal interest in protecting individual citizens from state action which is wholly arbitrary or irrational. The Florida Supreme Court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (1985), *appeal dismissed,* 106 S.Ct. 1624, 90 L.Ed. 2d 174 (1976), determined that the Legislature had a rational basis for enacting the statute in issue. "The

---

[6] As to cases addressing procedural due process, this Court in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432, 102 S.Ct. 1148, 1156 (1982), distinguished between the ability of the State to create and abolish causes of action from the deprivation of appropriate procedural safeguards.

legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." *Id.* at 659. *Pullum* was appealed to this Court which dismissed the appeal for lack of a substantial federal question. Thus, it cannot be said that the statute of repose is arbitrary or capricious, or that application of that statute to the instant action deprives Appellants of a property right without due process of law. Accordingly, there is no vested property interest in a pending tort claim and thus the claim that the Fourteenth Amendment was violated is clearly in error and does not present a substantial federal question. Wherefore, Appellee BUDD requests that this appeal be dismissed for want of a substantial federal question, or that the decision below be summarily affirmed.

—o—

CONCLUSION

Wherefore, BUDD respectfully submits that this appeal is dismissed for want of jurisdiction or for want of a substantial federal question or alternatively that it be summarily affirmed because it does not present a substantial federal question.

Respectfully submitted,

Rorert W. Pass
Carlton, Fields, Ward, Emmanuel,
Smith, Cutler & Kent, P.A.
25 West Cedar Street
Harbourview Building, 4th Floor
Post Office Box 12426
Pensacola, Florida 32582
(904) 434-0142
Attorneys for Appellee
THE BUDD COMPANY

In The

Supreme Court of the United States

October Term, 1986

———o———

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY,

Appellees.

———o———

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

———o———

APPENDIX TO MOTION OF APPELLEE THE BUDD COMPANY TO DISMISS OR AFFIRM

———o———

ROBERT W. PASS
CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A.
25 West Cedar Street
Harbourview Building, 4th Floor
Post Office Box 12426
Pensacola, Florida 32582
(904) 434-0142
Attorneys for Appellee

APPENDIX

TABLE OF CONTENTS

Initial Brief of Appellants
First District Court Of
Appeal, State of Florida
March 7, 1986 ..... App. 1

Appellants Reply Brief to
Answer of Appellees Ford Motor
Company, The Budd Company, The
Firestone Tire and Rubber Company
and Parties Amici Curiae, Florida
Defense Lawyers Association, and
Motor Vehicle Manufacturers
Association of the United States,
Inc., and Product Liability
Advisory Counsel, Inc.
May 2, 1986 ..... App. 17

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,	)	
Appellants,	)	DOCKET NO. BK-198
v.	)	
THE FIRESTONE TIRE AND RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,	)	CASE NO. 83-1934-CA-01
Appellees.	)	

INITIAL BRIEF OF APPELLANTS

SMITH, GRIMSLEY,
REMINGTON & KESSLER
Thomas T. Remington
P.O. Box 2379
Ft. Walton Beach, FL 32549
(904) 243-8194

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii-iii
PRELIMINARY STATEMENT		iv
ISSUE PRESENTED FOR REVIEW		v
STATEMENT OF CASE AND FACTS		1-2
SUMMARY OF ARGUMENT		3-4
PREFACE TO ARGUMENT		5
ARGUMENT		6-14
POINT I	THE ROOT OF THE ESTABLISHED RULE AGAINST APPLYING AN OVERRULING DECISION RETROACTIVELY TO THE OVERRULED DECISION IS FOUNDED IN EARLY AMERICAN STATE AND FEDERAL COURT DECISIONS	6-8
POINT II	THE "RELIANCE FACTOR" IS A SIGNIFICANT COMPONENT OF THE RULE AGAINST APPLYING AN OVERRULING DECISION RETROACTIVELY TO THE OVERRULED DECISION	9-12
POINT III	THE DOCTRINE OF FAIRNESS IS THE SUBLIMINAL FACTOR THAT UNDERLIES THE RULE AGAINST APPLYING AN OVERRULING DECISION RETROACTIVELY TO THE OVERRULED DECISION	13-14
CONCLUSION		15
CERTIFICATE OF SERVICE		16

TABLE OF AUTHORITIES

Page

CASE

Battilla v. Allis Chalmers, 392 So.2d 874 (Fla. 1980) ..... v, 1, 2, 8, 10

Bauld v. J. A. Jones Construction Co., 357 So.2d 401 12

Chevron Oil Company v. Huson, 404 US 97 30 L.Ed.2d 296, 92 S Ct 349 13

Culpepper v. Culpepper, 3 So.2d 380 (Fla. 1980) 10

Evans v. Evans, 194 So. 215 (Fla. 1940) 10

Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944) 3, 6, 8, 9

Gelpcke v. City of Dubuque, 1 Wall 175 17 L.Ed. 520 ..... 3, 6, 8

Johnson v. Midland Constructors, Inc., 7 So.2d 449 (Fla. 1942) 9

Kerce v. Coca-Cola Company-Foods Division, 389 So.2d 1177 (Fla. 1980) 11

Lee v. Bond-Howell Lumber Company, 166 So. 733 (Fla. 1936) 3, 11, 13

Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) ..... v, 1, 2, 4, 8, 15

Rodriques v. Aetna Casualty & Surety Company, 395 US 352 13

Simmons v. City of Coral Gables, 186 So.2d 493 (Fla. 1966) 10

TABLE OF AUTHORITIES—Continued

Page

Southern Brewing Co. v. May, 165 So. 627 (Fla. 1936) 10

State ex rel. Midwest Pipe & Supply Co. v. Haid, 52 SW 183 (Mo. Sup. Ct. 1932) 3, 8

Tigertail Quarries, Inc. v. Ward, 16 So.2d 812 (Fla. 1944) 9

OTHER AUTHORITIES

Blackstone Commentaries *69 6

47 *Harvard Law Review* 1403 9

18 *Columbia Law Review* 230 9

STATUTES

Section 95.031(2) Florida Statutes 1, 12

Section 95.11(3)(a) Florida Statutes 12

PRELIMINARY STATEMENT

Appellants-plaintiffs Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy, and Sharon Cassidy, as wife of Kenneth Cassidy will be referred to as "Cassidy", "the Plaintiffs", or "Kenneth Cassidy". Appellee-defendants Firestone Tire and Rubber Company, Ford Motor Company and the Budd Company will be referred to as "Firestone", "Ford" and "Budd" respectively, or as "defendants".

References to the record will be designated "R. —".

All emphasis is supplied unless otherwise stated.

ISSUE PRESENTED FOR REVIEW

The sole issue in this appeal is whether the Circuit Court erred in applying the decision of the Florida Supreme Court in the case of *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985) retroactively to appellants' action which was instituted in reliance on and in conformity with the existing law pronounced by the Supreme Court in *Battilla v. Allis Chalmers,* 392 So.2d 874 (Fla. 1980) prior to *Pullum.*

STATEMENT OF CASE AND FACTS

This is an appeal by plaintiffs from the final judgment of the Circuit Court for Escambia County, First Circuit, dismissing plaintiffs' action (R-51) on motions for summary judgment by defendants (R-29, R-43, R-46).

The cause of action involved herein accrued on February 6, 1982, when plaintiff, Kenneth Cassidy, was injured by the explosion of a multi-piece rim wheel (R-2) manufactured and marketed by defendants (R-10, R-14,

R-22) which admittedly was delivered to the original purchaser more than twelve years prior to Cassidy's injury.

The case on appeal to this Court was commenced on June 2, 1983, by Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy who, as a result of his massive bodily and head injuries, has been adjudged mentally incompetent (R-1, R-4). See R-52.

As a products liability action which accrued after the decision of the Supreme Court in *Battilla v. Allis Chalmers,* 392 So.2d 874 (Fla. 1980) construing Section 95.031(2) Florida Statutes as *unconstitutional* and long before the decision of the court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) construing Section 95.031(2) as *constitutional,** the gravamen of plaintiffs' complaint is that plaintiff Kenneth Cassidy's injury would not have occurred but for the fact that, despite defendants' repeated notice and knowledge over a prolonged period of time that their multi-piece rim wheels were causing numerous deaths and injuries, defendants failed and refused to discontinue production of its dangerously defective product when defendants knew that it could and should have been replaced by a safe product (R-4); defendants failed and refused to provide any warning to inform and protect the public against the dangers to life and limb inhering in defendants' multi-piece rim wheel product (R-4); defendants, although urged to do so, failed and refused to recall its dangerously defective multi-piece rim

---

* The decision in *Battilla v. Allis Chalmers,* supra, was rendered on December 11, 1980; plaintiff Kenneth Cassidy was injured on February 6, 1982; plaintiffs' action was instituted on June 2, 1983; the decision in *Pullman v. Cincinnati, Inc.,* supra, was rendered on August 29, 1985.

wheel product (R-4), any one of which actions defendants failed and refused to take would have served to save plaintiff and numerous other victims from deaths and injuries caused by defendants' multi-piece rim wheel product.

SUMMARY OF ARGUMENT

Appellants' argument will show that to the general rule of prospective/retrospective operation of an overruling decision, there is an exception which, over a period of many years, has become well established as a separate rule, best characterized as *The Rule Against Applying an Overruling Decision Retroactively to the Overruled Decision.*

The basis and application of this rule is set forth under the points of appellants' argument, demonstrating that where a statute has been held unconstitutional by a court of last resort and the Court later reconsiders its prior construction of the statute and declares it to be constitutional, the rights of the parties acted on in reliance upon the law rendered, are not to be denied by applying retroactively the changed construction of the statute embodied in the overruling decision. *Lee v. Bond-Howell Lumber Co.* 166 So. 733, 738 (Fla. 1936), *Gelpcke v. City of Dubuque* 1 Wall 175, 17 L.Ed. 520, 525, 526, *Florida Forest and Park Service v. Strickland* 18 So2d 251, 253 (Fla. 1944), citing case and language in *State ex rel. Midwest Pipe & Supply Co. v. Haid* 52 SW 183, 184, 185 [Mo. Sup. Ct. (1932)], Appellant Kenneth Cassidy's cause of action accrued on February 6, 1982, and he acted in accordance with his rights therein under the law existing prior to the August 29, 1985 decision of the Supreme Court in *Pullum v. Cincinnati, Inc.*, supra.

Under the recited principles of the law on nonretroactivity applicable to the facts of plaintiffs' case *Pullum* is not, properly, to be applied retroactively to plaintiffs' actions.

PREFACE TO ARGUMENT

The Judgment of the Circuit Court is Contrary to the Existing Rule of Law *Against* Retroactively (Retrospectively) applying an Overruling Decision to *the Cases of Parties Who Conformed Their Acts to the Overruled Decision.* Accordingly, the Summary Judgment of the Circuit Court Below Should be Set Aside.

The rationale of the stated rule is demonstrated by the cases and authorities embodied in the points of Appellants' Argument set forth.

APPELLANTS' ARGUMENT

I.

THE ROOT OF THE ESTABLISHED RULE AGAINST APPLYING AN OVERRULING DECISION RETROACTIVELY TO THE OVERRULED DECISION IS FOUNDED IN EARLY AMERICAN STATE AND FEDERAL COURT DECISIONS.

The present prevailing rule of law against retroactive application of any overruling decision to the overruled decision represents a full course departure of our courts from our inheritance of the common law of England which bound itself to the theory of retroactive application.[1]

---

[1] Blackstone Commentaries *69

Refusal of State and Federal courts of America to adhere to the English rule of law on retroactivity began more than a century ago. *Gelpcke v. City of Dubuque,* supra (cited by the *Florida Forest and Park Service v. Strickland,* supra) was decided by the U. S. Supreme Court in 1863. In *Gelpcke* the Iowa Supreme Court first, in 1853, construed as constitutional a statute enacted by the Iowa legislature; then, some six years later, in 1859, construed the subject statute as unconstitutional. The Supreme Court held that the 1859 overruling decision could not be applied retroactively to its overruled 1853 decision. After stating "[h]owever we may regard the late case in Iowa as affecting the future, *it can have no effect on the past",* the court affirmed the rule that a decision "altering the construction of the law" pronounced by the court in a prior decision may not be applied retroactively to the court's prior decision.

At close, the Court stated:

> "The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law . . . *It rests upon the plainest of principles of justice.* To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

In another case cited by the Florida Supreme Court as an authority for its decision in *Florida Forest and Park Service,* the Supreme Court of Missouri in Banc amplified full meaning of the principle enunciated by the Court in *Gelpcke* when it stated:

> "The generally accepted rule is to the effect that the judicial construction of a statute by a court of last resort *becomes as much a part of the statute as*

> *the text itself,* and a *subsequent change* in the construction of a statute *by judicial decision of the court of last resort,* is the same, in effect, *as if the statute had been amended by legislative enactment.* (Cits)
>
> "Consequently the courts have established and adopted the rule that, where a statute or law has received a given construction by a court of last resort, the rights, positions, and course of action *of parties who have acted in conformity with and in reliance upon such construction* of the statute are not in any wise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort, in overruling its former decision, and the effect of the change in judicial construction is that it operated *prospectively, and not retrospectively,* in the same manner as though the statute or law has been amended by the Legislature. *State ex. rel. Midwest Pipe & Supply Co. v. Haid,* 52 SW2d, 183, 184, 185 (Mo. Sup. Ct. 1932)"

The Circuit Court's judgment dismissing Plaintiffs' case by applying retroactively the decision of the Supreme Court in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) is in error in that it is contrary to the rule against applying an overruling decision to the cases of parties, as Cassidy, who conformed their acts to the overruled decision.[2] *Gelpcke v. City of Dubuque,* 1 Wall 175 17 L.Ed. 520 (U.S. Sup. Ct. 1863), *State ex. rel. Midwest Pipe & Supply Co. v. Haid,* 52 SW2d 183 (Mo. Sup. Ct. 1932), *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944).

---

2. In this case *Battilla v. Allis Chalmers,* supra

II.

THE *"RELIANCE FACTOR"* IS A SIGNIFICANT COMPONENT OF THE RULE AGAINST APPLYING AN OVERRULING DECISION RETROACTIVELY TO THE OVERRULED DECISION.

The courts and legal scholars, universally, hold that the reliance of the parties on the law of a prior decision of a court of last resort is the most compelling reason for not allowing the overruling law of a later decision of the same court to be applied retroactively to the overruled law of its prior decision. *Reliance* is easily recognized and understood as a significant component of the rule against applying an overruling decision retroactively because the rule it supports springs from natural laws of justice and fairness.[3]

The Florida Supreme Court in *Florida Forest and Park Service v. Strickland,* supra, refused to apply its overruling decision [*Johnson v. Midland Constructors, Inc.,* 7 So.2d 449 (Fla. 1942)] to claimant Strickland who had acted in reliance on the Court's overruled decision [*Tigertail Quarries, Inc. v. Ward,* 16 So.2d 812 Fla. 1944)].

In *Florida Forest and Park Service,* the Court cited *Culpepper v. Culpepper,* 3 So.2d 330 (Fla. 1941) to emphasize that the law in effect at the time a party acts in accordance with his rights is the law that applies and is to be abided as against the law declared differently in the Court's overruling decision. In *Culpepper* the Court refused to dismiss Culpepper's action by retroactively applying to it

---

[3] 47 Harvard Law Review 1403, *The Effect of Overruled and Overruling Decisions on Intervening Transactions.*

18 Columbia Law Review 230, *The Protection Afforded Against Retroactive Operation of an Overruling Decision.*

the Court's overruling decision (*Evans v. Evans,* 194 So. 215 (Fla. 1940) to its overruled decision [*Southern Brewing Co. v. May,* 165 So. 627 (Fla. 1936)].

The Court in *Culpepper* summarized the gist of its decision:

> "Under the factual conditions as disclosed by the record, we must hold that the Defendant had the right to rely upon the decision of this court in the *Southern Brewing Co.* case."

Similarly, at the time appellant Cassidy's cause for action accrued (February 6, 1982) (R. 1), he acted upon rights therein by instituting the lawsuit herein under the law as it existed at the time (*Battilla v. Allis Chalmers,* supra.)

In *Simmons v. City of Coral Gables,* 186 So.2d 493, 495 (Fla. 1966), the Court explained: "The accident occurred on October 31, 1962, and therefore, the statutory and decisional law pertinent on that date must prevail" c/f *Kerce v. Coca-Cola Company-Foods Division,* 389 So.2d 1177 (Fla. 1980).

Likewise, in *Lee v. Bond-Howell Lumber Co.,* 166 So. 733, 738 (Fla. 1936) where the Supreme Court refused to apply its overruling decision to the case of a party who had acted in reliance on the Court's prior decision constructing the statute involved as "partly void" and unconstitutional, the Court stated:

> "[I]f a practical situation has come about during which it appears that a statute was declared void, or a particular construction of it adopted at one time, and afterwards, on a reversal of the judicial review, the courts have at a later date reconsidered and adjudged such statute to be valid or construed it differently, then intervening transactions should be governed and *pre-*

> *existing rights involved there, according to the rule of the first judicial decision rendered,* so long as that judicial decision was allowed to stand and be understood and *acted on* by the people as the applicable law of the land for the time being."

A review of the cases demonstrated that the Florida Supreme Court has consistently adhered to the rule against applying its overruling decision to the overruled decision where to do so would serve to destroy the rights of parties which accrue and are acted on in the interim in reliance on and in conformity with the prevailing law of the overruled decision.[4]

III.

THE DOCTRINE OF FAIRNESS IS THE SUBLIMINAL FACTOR THAT UNDERLIES THE RULE AGAINST APPLICATION OF AN OVERRULING DECISION TO THE OVERRULED DECISION.

The rule against applying an overruling decision to the overruled decision where to do so would serve to destroy the rights of parties which accrue and are acted on in

---

[4] The Supreme Court in *Bauld v. J. A. Jones Construction Co.* 357 So.2d 401 defined Section 95.11(3)(a) [analogous to Section 95.031(2)] as a *statute of repose* as distinguished from a statute of limitation. The court, speaking through Justice Boyd, explained:

> "Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, *these provisions cut off the right of action* after a specified time measured from the delivery of a product or the completion of work. They do so *regardless of the time of accrual of the cause of action* or *notice of the invasion of a legal right.*"

the interim in reliance on and in conformity with the prevailing law of the overruled decision stems from clear principles of justice and fairness which underlie its adoption and enforcement by the courts. In the last cited case in Point II, *Lee v. Bond-Howell Lumber Co.*, supra, the Court observed:

> "This rule has been adopted because the unjustice of any other rule would be so great as to be judicially intolerable."

In *Chevron Oil Company v. Huson*, 404 US 97, 30 L.Ed.2d 296, 92 S Ct 349, the Court refused to dismiss plaintiff's cause by applying its decision in *Rodriques v. Aetna Casualty & Surety Co.*, 395 US 352 retroactively to *Chevron*, a pending case, *as Cassidy at the time of the decision in Pullum.* In addressing the issues of fairness in *Chevron*, the Court asserted:

> "To abruptly terminate this lawsuit that has proceeded through *lengthy* and no doubt, *costly discovery stages* for a year would surely be inimical to the beneficial purposes of the Congress."

Fairness is certainly a paramount consideration involved in the question of retroactivity in the present case herein on appeal. To apply *Pullum* retroactively to Cassidy after acting on the existing law and proceeding through lengthy and costly stages of discovery for more than two years would be as much unfair as noted by the Court in *Chevron.* In Cassidy, progressing through two and one-half years of discovery proceedings has involved hundreds of interrogatories, inspection of exhibits, requests for admissions, production of documents and numerous depositions requiring large numbers of hours at work and thousands of dollars in expenses in preparing the case.

Such a costly undertaking would not have been entered and pursued over a period of more than two and one-half years to near-point of full readiness for trial[5] without *a reliance, as evidenced,* on the law which existed at the time plaintiff instituted his action and which prevailed until *Pullum.*

CONCLUSION

The foregoing points of this brief demonstrate that under the rule against applying the law of an overruling decision retroactively to the law of the overruled decision, where to do so would serve to destroy the rights of parties which accrue and are acted on in the interim in reliance on and in conformity with the prevailing law of the overruled decision—as did plaintiff Kenneth Cassidy in the instant case—renders erroneous the judgment of the Circuit Court in dismissing plaintiff's action by applying retroactively the decision in *Pullum v. Cincinnati, Inc.,* supra.

SMITH, GRIMSLEY, REMINGTON
& KESSLER

By: /s/ Thomas T. Remington
P.O. Box 2379
Ft. Walton Beach, FL 32549
(904) 243-8194

ATTORNEYS FOR APPELLANTS

---

[5] The case was already set for trial January 27, 1986, by order of the Court, September 25, 1985.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to

G. JACK HARDY, ESQ.
Preddy, Kutner & Hardy
501 NE First Avenue
Miami, FL 33132

JOHN N. BOGGS, ESQ.
Attorney at Law
P.O. Box 1637
Panama City, FL 32402

J. DIXON BRIGERS, III, ESQ.
Carlton, Fields, et al
P.O. Box 12426
Pensacola, FL 32582

THOMAS C. SCHULT, ESQ.
2600 Mutual Benefits Life Bldg.
2345 Grand Avenue
Kansas City, MO 64108

GERALD M. McGILL, ESQ.
Southworth & McGill
801 North 12th Avenue
Pensacola, FL 32501

JOHN L. MYRICK, ESQ.
Kinsey, Myrick, Troxel & Johnson
438 E. Government Street
Pensacola, FL 32501

by mail this 7th day of March, 1986.

/s/ Thomas T. Remington
Attorney for Appellants

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

EFFIE DELL CASSIDY, etc., et al,	)	
Appellants,	)	
v.	)	DOCKET NO. BK.198
THE FIRESTONE TIRE AND RUBBER COMPANY, et al,	)	CASE NO. 83-1934-CA-01
Appellees.	)	

APPELLANTS REPLY BRIEF TO ANSWER BRIEFS OF APPELLEES FORD MOTOR COMPANY, THE BUDD COMPANY, THE FIRESTONE TIRE AND RUBBER COMPANY, AND PARTIES AMICI CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION, AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND PRODUCT LIABILITY ADVISORY COUNCIL, INC.

SMITH, GRIMSLEY, REMINGTON
& KESSLER

Thomas T. Remington
P.O. Box 2379
Ft. Walton Beach, FL 32549
(904) 243-8194

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iv-v

PRELIMINARY STATEMENT ..... vi-vii

SUMMARY OF ARGUMENT 1-3

ARGUMENT 4-27

No. 1 Reply to Answer Brief of *Appellee Ford Motor Company* 4-10

PART I APPELLEE FORD'S ANSWER BRIEF IS NOT ADDRESSED TO *AND DOES NOT REBUT* THE POINTS OF APPELLANTS BRIEF AGAINST APPLYING *PULLUM* RETROACTIVELY 4-7

First: Appellee Ford's Brief Leaves Standing Against Ford's Position the Principal of Law Embodied in Point I of Appellants Initial Brief 4-6

Second: Ford's Answer Brief Misconstrues the *Reliance Factor* and *Doctrine of Fairness* Embodied in Points II and III of Appellants Initial Brief Which Underpins the Rule Against Applying An Overruling Decision Retroactively to the Overruled Decision 7

PART II APPELLEE FORD'S ANSWER BRIEF ATTEMPTS TO SUBVERT THE TRUE MEANING OF ARGUMENTS IN APPELLANTS INITIAL BRIEF AGAINST RETROACTIVE APPLICATION OF *PULLUM* TO CASSIDY 8-10

No. 2 Reply to Answer Brief of *Appellee The Budd Company* 11-20

POINT I THE OVERALL SCOPE OF APPELLEE BUDD'S ANSWER BRIEF, CONTENDING THAT *PULLUM* "MUST" BE APPLIED RETROACTIVELY TO APPELLANT CASSIDY'S PENDING ACTION, IS CONTRARY TO PREVAILING PRINCIPLES OF LAW WHICH PROTECT CASSIDY'S SUBSTANTIVE RIGHTS IN HIS CAUSE OF ACTION WHICH ACCRUED PRIOR TO *PULLUM* 11-18

[1] *Existing Rights Protected by the Rule Against Application of Overruling Decision Are Not Exclusively Contract and Property Rights* 11-15

[2] *Failure of Court to Assert "Prospective" Only Proviso in Overruling Decision Does Not, In and of Itself, Mandate That Its Overruling Decision Must Be Applied Retroactively* 15-17

[3] *The Attempt of Budd's Answer Brief to Have the Issue of This Appeal Substituted by One Not the Issue is Inappropriate and Irrelevant to the Question Presented to This Court for Determination* 17-18

POINT II THE ANSWER BRIEF OF BUDD CITES CASES AND PRESENTS ARGU-

MENTS NOT IN CONTEXT OF OR AMENABLE TO THE PRINCIPLES OF LAW THAT CONSTITUTE THE RULE AGAINST RETROACTIVELY APPLYING AN OVERRULING DECISION OF THE COURT TO ITS OVERRULED DECISION 19-20

No. 3 Reply to Answer Brief of *Appellee Firestone Tire and Rubber Company* 21-27

I. WHERE CITATIONS IN FIRESTONE'S ANSWER BRIEF ARE SHORTFALLED BY DELETIONS OR OTHERWISE FIRESTONE'S ARGUMENTS THEREABOUT ARE RENDERED INVALID 21-24

II. FIRESTONE'S ARGUMENT THAT SECTION 95.031(2) FLORIDA STATUTES AS IT EXISTED PRIOR TO *BATTILLA* SHOULD BE APPLIED TO *CASSIDY*, A CASE BROUGHT AFTER *BATTILLA* AND PRIOR TO *PULLUM* WHEN SECTION 95.031(2) DID NOT EXIST IS WITHOUT FOUNDATION IN FACT OR THEORY 25-27

CONCLUSION 28-30

CERTIFICATE OF SERVICE 31-32

INDEX ON APPENDIX 33

TABLE OF AUTHORITIES

CASES — Page

Battilla v. Allis Chalmers, 392 So.2d 874 (Fla. 1980) 2, 5, 6, 7, 18, 22, 23, 25, 29

Bauld v. J. A. Jones Construction Company, 357 So.2d 401 (Fla. 1978) 23

Bryant v. School Board of Duval County, Fla., 399 So.2d 417 (Fla. App. 1 DCA, 1980) 13, 14, 30

Cates v. Graham, 451 So.2d 475 (Fla. 1984) 23

Chevron Oil Company v. Huson, 404 U.S. 97 30 L.Ed. 2d 296, 92 S Ct 349 (1971) 8, 9

Christoper v. Mungen, 55 So. 273 (Fla. 1911) 21, 22, 23, 25, 26, 29

Fleeman v. Case, 342 So.2d 815 (Fla. 1976) 14

Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1966) 19

Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944) 2, 4, 16, 17, 20, 29

Foley v. Morris, 339 So.2d 215 (Fla. 1976) 12

Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978) 20

International Studio Apartment Association v. Lockwood, 421 So.2d 1119 (Fla. App. 4 DCA, 1984) 8, 9, 10

Lemon v. Kurtzman, 411 U.S. 192 9

Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 15, 17, 18, 23, 24, 25, 26, 29, 30

Pullum v. Cincinnati, Inc., 458 So.2d 1136 (Fla. App. 1 DCA, 1984) 23, 24

Purk v. Federal Press Company, 387 So.2d 354 (Fla. 1980) 23, 24

Seddon v. Hurpster, 403 So.2d 409 (Fla. 1981) 14

Simmons v. City of Coral Gables, 186 So.2d 493 (Fla. 1966) 14

State v. Lavazzoli, 434 So.2d 321 (Fla. 1983) 19, 20, 27

Tigertail Quarries, Inc. v. Ward, 16 So.2d 812 (Fla. 1944) 16, 17, 30

Trustees of Tufts College v. Triple R Ranch, Inc., 275 So.2d 521 (Fla. 1973) 14

STATUTES

Section 95.031(2) Florida Statutes 2, 5, 6, 7, 18, 25, 26

PRELIMINARY STATEMENT

1. Appellants reply brief will undertake to adequately reply to all answer briefs at the same time endeavoring *to stick as closely as possible to the real issue of this appeal,* to avoid further compounding the large volume of argument generated by the six answer briefs of parties Appellee and amici curiae, respectively. The arguments of Appellees Ford, Budd and Firestone are addressed both separately and compositively in the main body of Appellants reply brief. Reply to amici curiae briefs, incorporating opinions of lower state and federal courts, is set forth in the appendix of Appellants reply brief.

2. The table of reference provided in the Preliminary Statement of Appellants initial brief is incorporated in Appellants reply brief herein,[1] supplemented as follows:

References to Answer Brief of:	Designated by:
Ford Motor Company	"FB ——————"
The Budd Company	"BB ——————"
Firestone Tire and Rubber Company	"TB ——————"
Cassidy Initial Brief	"CIB ——————"
Cassidy Reply Brief	"CRB ——————"
Reply Brief Appendix	"A ——————"

---

[1] Transmitted for Convenience of Court:

Appellant-Plaintiffs Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy and Sharon Cassidy, as wife of Kenneth Cassidy, will be referred to as "Cassidy", "the Plaintiffs" or "Kenneth Cassidy". Appellee-Defendants Firestone Tire and Rubber Company, Ford Motor Company and The Budd Company will be referred to as "Firestone", "Ford" and "Budd" respectively, or as "Defendants". References to the Record will be designated "R —". All emphasis is supplied unless otherwise stated.

SUMMARY OF ARGUMENT

The content of Appellants reply brief herein, we respectfully submit, will demonstrate to the Court that the answer briefs of Appellees and parties amici curiae do not address an answer to the governing principles of law applicable to the facts of this appeal succinctly set forth as follows:

> *"Where a statute or law has received a given construction by a court of last resort, the rights, positions and courses of action of parties who have acted in conformity with and in reliance upon such construction of the statute are not in anywise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort, in overruling its former decision."*

The answer briefs of Appellees and parties amici curiae do not address the stated principle of the law against applying the overruling decision of a court retroactively to its overruled decision. Appellees answer briefs fail to discredit it or offer any authority from the cases to contradict it. In failing to do so, Appellees fail, at start, to meet the test of their contention that *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985) should be applied retroactively to Cassidy.

The principle of law against applying an overruling decision of a Court retroactively to its overruled decision stands in this Court on the ong land firmly established authority of *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944). Unable to still the voice of the Florida Supreme Court in Strickland, Appellees seek desperately to find ways to get around *Strickland.* The ways they suggest to the Court are (a) that the Court

deem the aforestated principle of law embodied in *Strickland* as applicable only to cases involving contract or property rights and (b) that without a "prospective only" proviso *Pullum* must be applied retroactively notwithstanding *Strickland.* In Appellants reply brief, both of these claims are shown to have no validity, particularly as to claim (a) at page 11 of the reply brief as to claim (b) at page 15 of reply brief.

Appellees, recognizing the instant case to be firmly lodged in the aforestated applicable law of this appeal, finally attempt to theorize to this Court that Section 95.031(2) Florida Statutes as to existed *prior* to *Battilla v. Allis Chalmers,* 392 So.2d 874 (Fla. 1980), should be applied to *Cassidy,* a case brought on the state of the law after *Battilla* when Section 95.031(2) did not exist. At page 23 of reply brief the fallacy of Appellees theory is demonstrated.

In short, the many pages of the answer briefs of Appellees and parties amici curiae do not rebut the facts and applicable law of this appeal which sustain Appellants position that *Pullum* should not be applied retroactively to *Cassidy* and reply Appellees positions to the contrary.

ARGUMENT

No. 1 Reply to Answer Brief of Appellee Ford Motor Company

PART I APPELLEE FORD'S ANSWER BRIEF IS NOT ADDRESSED TO *AND DOES NOT REBUT* THE POINTS OF APPELLANTS BRIEF AGAINST APPLYING *PULLUM* RETROACTIVELY

First: Appellee Ford's Brief Leaves Standing Against Ford's Position the Principal of Law Em-

bodied in Point I of Appellants Initial Brief That an Overruling Decision of a Court of Last Resort Changing Its Construction of a Statute Is Not To Be Applied Retroactively to a Party's Cause of Action Accruing and Commenced in Conformity with and In Reliance Upon the Court's Prior Construction of the Same Statute

Point I of Appellants brief confronted Ford with the following statement of law enunciated by the Florida Supreme Court in *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944):

> "(W)here a statute or law has received a given construction by a court of last resort, the rights, positions, and course of action of parties who have acted in conformity with and in reliance upon such construction of a statute are not in anywise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort overruling its former decision." (CIB-8)

This statement of law stands squarely against Ford's contention that *Pullum* should be applied retroactively to Cassidy. Yet, Ford's *answer* brief does not address it, question it, challenge it or rebut it.

Failure of Ford's *answer* brief to answer Point 1 of Appellants brief telling demonstrates and concedes that in its search of the cases for authority to overturn this statement of law, Ford found nothing.[2] The operative facts of

---

[2] Indeed, in Plaintiffs reasonably extensive research of the law applicable to overruling decisions of court no cases or authority were found that contradicted or disputed this statement of law and the reasoning of the courts their adherence to it.

Cassidy are clear and undisputed. Plaintiff Kenneth Cassidy's cause of action accrued and was commenced in Court subsequent to the Supreme Court's construction of Section 95.031(2) in *Battilla* and prior to the Court's changed construction of Section 95.031(2) in *Pullum,* thus placing Cassidy squarely within the ambit of the heretofore recited law against retroactivity. Even Ford in its answer brief expresses conclusions admitting of facts which place Cassidy's action within the ambit of law against retroactivity, e.g.

> "Since the *Battilla* decision in 1980 and until the Supreme Court's decision in *Pullum* in 1985, Section 95.031(2) has had *no effect* in banning the filing of a suit." (FB-4)
>
> "The Supreme Court's decision in *Battilla* allowed Cassidy to file a suit which would have been otherwise banned by the clear and direct application of Section 95.031(2) Florida Statutes (1975)." (FB-6)

Clearly, such admissions appearing in Ford's brief are not rebuttal to Plaintiffs case; they acknowledge its validity.

Point I of Appellants brief stands at the threshold of the law and argument of Appellants case requisite for Ford to controvert. In failing to address or rebut it, Ford's position contrary to Cassidy's case against retroactive application of *Pullum* goes down at the outset.

> *Second*: Ford's Answer Brief Misconstrues the Relevancy of the *Reliance Factor* and *Doctrine of Fairness* Embodied in Points II and III, Respectively, of Appellants Brief.
>
> At FB-2, Ford contends:
>
> "(N)o reliance on the *Battilla* decision could have changed anything in the instant case. Cassidy could

> have done nothing differently to change the effect of *Pullum* if it is applied retroactively."

The catch line to Ford's contention is "if it (*Pullum*) is applied retroactively." What this entire appeal is about is that *Pullum* should not be applied retroactively. Ford's surmise does not recognize what is at stake in Kenneth Cassidy's having acted in reliance on the Supreme Court's construction of Section 95.031(2) in *Battilla* and why the doctrine of fairness stands against applying retrospectively to Cassidy and the Court's *changed construction* of Section 95.031(2) in *Pullum*.

In point of reliance and fairness, Appellants brief pointed out:

> "Such a costly undertaking (institution of action) would not have been entered and pursued over a period of more than two and one-half years to near-point of full readiness for trial (set for January 27, 1986) without *a reliance, as evidenced,* on the law which existed at the time plaintiff instituted his action and which prevailed until *Pullum.*" (CIB-14)

PART II FORD'S ANSWER BRIEF MISAPPREHENDS PRINCIPLE OF LAW STANDING AGAINST RETROACTIVE APPLICATION OF *PULLUM* TO *CASSIDY*

A major portion of Ford's answer brief[3] is devoted to detailing precisely what is required in order to place a case within the ambit of *Chevron Oil Company v. Huson,* 404 U.S. 97 as applied in *International Studio Apartment Association, Inc. v. Lockwood,* 421 So.2d 1119 (Fla. App. 4 DCA, 1984). There is some confusion in Ford's under-

---

[3] Comprises five of the nine pages of Ford's argument.

taking to relate this to *Cassidy*. For clarification, it should be noted that Appellants brief cite this federal case only for the purpose of bringing to the attention of the Court what the U.S. Supreme Court expressed on the doctrine of fairness, to wit:

> "To abruptly terminate this lawsuit that has proceeded through *lengthy* and no doubt, *costly discovery stages* for a year would surely be inimical to the beneficial purposes of the Congress."

While the substantive rationale of *Chevron* is clearly favorable to Appellant in that it forcefully stands for the just and fair principle that the law of an overruling decision not be applied retroactively to the cases of parties who acted in reliance on the law of the overruled decision, *Chevron* is federal and Plaintiffs position herein is fully secured, and more appropriately so by sticking to Florida law as given by our Florida Supreme Court. In this connection it is decisively significant to note that the Court in the subject case (*International Studio Apartment Association v. Lockwood*) advanced by Ford, the Court stated "Had the 1980 decision declaring the statute uncontitutional emanated from the Florida Supreme Court rather than the Supreme Court of the United States, it would have qualified as an 'overruling decision' *and the exception permitting prospective operation only would have applied*" at page 1121.

The exception to which the Court referenced its statement was set forth by the Court earlier in its opinion that "the rights, positions and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change

in judicial construction of the same statutes made by a subsequent decision of the same Court overruling its former decision."

Moreover, in *International Studio* cited the U.S. Supreme Court case of *Lemon v. Kurtzman,* 411 U.S. 192, wherein the Court stated:

> "(S)tatutory or even judge-made rules of law are hard facts on which people must rely in making decision and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing *the doctrine of non-retroactivity.* Id. at 199 S. Ct. at 1468." See *International Studio* at 1122.

We respectfully submit that Ford in citing *International Studio* as authority for its position seeking to have the Court apply the overruling decision in *Pullum* to Cassidy has misapprehended the truth and reality of the law on retroactivity in this as in other instances of its answer brief, e.g. Ford's statement noted at pages 2-3 of Appellants brief herein.

No. 2 Reply to Answer Brief of

Appellee The Budd Company

POINT I THE OVERALL SCOPE OF APPELLEE BUDD'S ANSWER BRIEF, CONTENDING THAT *PULLUM* "MUST" BE APPLIED RETROACTIVELY TO APPELLANT CASSIDY'S PENDING ACTION, IS CONTRARY TO PREVAILING PRINCPLES OF LAW WHICH PROTECT CASSIDY'S SUBSTANTIVE RIGHTS IN HIS CAUSE OF ACTION WHICH ACCRUED PRIOR TO *PULLUM*

The answer brief of Appellee The Budd Company is massive. In order to avoid a situation of replying to the trees without addressing the forest, we begin Appellants

brief by reply to the overall argument implanted in Appellee Budd's brief.

[1] *Existing Rights Protected by the Rule Against Application of Overruling Decision Are Not Exclusively Contract and Property Rights.*

The gist of Budd's overall argument is that (a) there is almost never an occasion where the overruling decision of a court of last resort should not be applied retroactively to its overruled decision and (b) if and whenever there be an occasion for not applying the overruling decision retroactively the area of the law allowing it is so "*narrow*" that a case like the instant case, Cassidy, cannot pass through it. Specifically, Budd argues that unless pre-existing *contract* or *property* rights are impaired by a retroactive application of the overruling decision, the rule[4] against applying an overruling decision retroactively to the overruled decision does not apply.

The key word is not contract or property. The key word is "rights". The flaw in Budd's restrictive analysis is its confinement to the words "contract" and "property". The Florida Courts in myriad decisions have broadly acted firmly and zealously to protect the rights of parties against retroactivity, particularly where retroactivity would destroy the "substantive rights" of a party. It is clear that under almost all circumstances the courts will not apply a change in the law retroactively to a cause of action which accrued prior to the time that the law was changed. In *Foley v. Morris*, 339 So.2d 215 (Fla. 1976),

---

[4] (T)o the general rule of prospective/retrospective operaeration of an overruling decision, there is an exception which, over a period of many years, has become well established as a separate rule, best characterized as *The Rule Against Applying an Overruling Decision Retroactively to the Overruled Decision.* (CIB-3)

the Supreme Court, noting that plaintiff's cause of action accrued on September 11, 1971, while a four year statute of limitations was in force, refused to bar plaintiff's action by retroactively applying a two year limitation prescribed by amendment of the statute which was not effective until July 1, 1972. In its decision, the Court recognized that "rights accrued, claims arising, proceedings instituted" under the prior law are not to be impaired by retroactively applying a subsequent change in the law to plaintiff's cause of action.

In *Bryant v. School Board of Duval County, Fla.*, 399 So.2d 417 (Fla. App. DCA 1, 1981) this court reversed the order of the Circuit Court dismissing plaintiff's cause of action (sounding in negligence) for applying retrorespectively to plaintiff's cause of action terms of a statute where plaintiff's cause of action accrued prior to enactment of the statute. The Court stated, "we agree with Bryant's argument that the abolition of his right to sue Rupp and Stasco for ordinary negligence is unconstitutional since it affects *rights which had become vested.*" In the fact of *Bryant* plaintiff's rights, which prevailed over retroactivity, vested when his cause of action accrued and he commenced his action. In *Bryant* there was no impairment of contract or property rights involved; only plaintiff's *substantive rights* existing in his cause of action which were not to be impaired by retroactivity.[5]

---

[5] It may be noted, of course, that the decision in the cited case deals with a legislative enactment as affected by the question of retroactivity while the appeal herein deals with the question of retroactivity as affected by the court's construction of the subject statute. In each instance, however, the underlying considerations on questions of retroactivity are identical and the relevant principles of law are equally applicable to both.

Moreover, the decision of this Court in *Bryant,* which is in full accord with firmly established Florida law, *Seddon v. Hurpster,* 403 So.2d 409 (Fla. 1981); *Fleeman v. Case,* 342 So.2d 815 (Fla. 1976); *Trustees of Tufts College v. Triple R Ranch, Inc.,* 275 So.2d 521 (Fla. 1973), involving as it does a tort action and not a workmen's compensation claim, stands in solid reply to Budd's argument that the case of *Simmons v. City of Coral Gables,* 186 So.2d 493 (Fla. 1966) quoted in Appellants initial brief, must be disregarded as authority because it involved a workmen's compensation action. (BB-17) The challenged portion of Appellants initial brief reads as follows:

> "In *Simmons v. City of Coral Gables,* 186 So.2d 493, 495 (Fla. 1966), the Court explained: "The accident occurred on October 31, 1962, and therefore, the statutory *and decisional law* pertinent on that date must prevail." (CIB-10, 11) Emphasis Supplied.

Appellants initial brief further pointed out that similarly, at the time Appellant, Cassidy's, cause of action accrued (February 6, 1982), he acted upon rights therein by instituting the lawsuit herein under the law as it existed at the time. (CIB-10) This is the factual situation involved in the instant case. It is apposite to the applicable law of Florida standing against Budd's position which Budd's brief does not, nor can it, rebut.

[2] *Failure of Court to Assert "Prospective" Only Proviso in Overruling Decision Does Not, In and of Itself, Mandate That It's Overruling Decision Must Be Applied Retroactively*

In its answer brief Budd takes the position that simply because the Court in its *Pullum* decision failed to assert a "prospective" only proviso, *Pullum* must be applied retroactively to Cassidy. Budd tightly contends that "the

specific declaration of 'a prospective only' proviso must be contained in the overruling opinion" (BB-8) and "unless *specifically* declared by the opinion to have prospective effect only" the decision must be applied retroactively. (BB-4) The first consideration which renders Budd's contention unacceptable is that it consists entirely of Budd's own undocumented opinion. Budd's brief does not cite a single case prescribing that such declaration of "prospective only" must be provided in the overruling decision in order for it not to apply retroactively.

But, on the other hand, for a case that totally repels Budd's contention we need to look no further than the familiarly cited in the briefs of this appeal, *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944) viewed vis-a-vis *Tigertail Quarries, Inc. v. Ward,* 16 So.2d 812 (Fla. 1944). In Strickland, as now in the instant case, Cassidy, parties defendant sought to have the Court apply its overruling decision in *Tigertail Quarries* retroactively against *Strickland.*[6] Examination of *Tigertail Quarries* discloses that there is no specific declaration of a "prospec-

---

[6] The large amounts of attention given to *Florida Forest and Park Service v. Strickland,* supra by Appellees in their respective answer briefs enunciated demonstrates that Appellees fully recognize the rule enunciated by the Florida Supreme Court in *Strickland* against allowing the rights of parties to be impaired or destroyed by applying an overruling decision retroactively to the Court's overruled decision is controlling to the question to be decided in this appeal. And knowing as they do that Appellees cannot prevail in this appeal so long as *Strickland* remains standing in this appeal in favor of Appellants position and against Appellees position, Ford, Budd and Firestone, in their answer briefs, attempt every conceivable argument to read out of this appeal the law of *Strickland* applicable to *Cassidy,* all to no avail.

tive only" proviso to be found anywhere in the entire decision. Since the Court refused to apply its overruling decision in *Tigertail Quarries* to *Strickland,* notwithstanding the absence of a "prospective only" proviso in *Tigertail Quarries,* it is obvious that Budd's contention is totally erroneous. Clearly there is no merit in the argument that *Pullum* must be applied retroactively because a "prospective only" proviso is not incorporated in it.

[3] *The Attempt of Budd's Answer Brief to Have the Issue of This Appeal Substituted by One Not the Issue is Inappropriate and Irrelevant to the Question Presented to This Court for Determination*

After attempting throughout the course of its answer brief to confuse and cloud the real matter on appeal in the instant case, Cassidy,—i.e. the question of whether or not the Court below erred in applying *Pullum* retroactively to Cassidy—Budd near the close of its brief acknowledges the true aim of its attempt at avoidance by stating:

> "What appellee seeks is the statute of repose be applied to the instant case."

Obviously and very simply what Budd seeks is to have the appeal herein treated as one in which Appellants action accrued and was instituted at the time of the Court's construction of Section 95.031(2) Florida Statutes in *Pullum* and not as it was, within the time of the Court's construction of Section 95.031(2) in *Battilla.* This, of course, is so far off base as hardly to call for even the slightest argument.

Appellees originated the question of retroactivity in moving the Circuit Court on summary judgment to dismiss Appellants action by applying *Pullum* retroactively to

Cassidy. The inception of the appeal herein is from the order of the Circuit Court which "concluded *Pullum* has retroactive application". (R-50) It is not [sic] logical and would not appear permissible for Appellee to renounce and switch from the ground in an attempt to overcome the weight of Appellants position which demonstrates the error of the Court below in concluding that *Pullum* applies retroactively to Cassidy.

Likewise, repeated claims in Budd's answer brief as to the merits and purposes of Section 95.031(2) as perceived by Appellants are irrelevant to the issue of this appeal. The Court's construction of Section 95.031(2) at the given time control. Parties are required to act in reliance upon the law in force at the time: *Pullum* as of now; *Battilla* within the time Appellants cause of action accrued and was acted upon.

POINT II THE ANSWER BRIEF OF BUDD CITES CASES AND PRESENTS ARGUMENTS NOT IN CONTEXT OF OR AMENABLE TO THE PRINCIPLES OF LAW THAT CONSTITUTE THE RULE AGAINST RETROACTIVELY APPLYING AN OVERRULING DECISION OF THE COURT TO ITS OVERRULED DECISION

EXAMPLE: *Florida East Coast Railway Co. v. Rouse,* 194 So.2d 260 (Fla. 1966)

As footnote at page 16 of Budd's answer brief under Point I-B, Budd cites the case of *Florida East Coast Railway Company v. Rouse,* 194 So.2d 260 (Fla. 1966), citing *Rouse* as a case "wherein the Supreme Court stated that the general rule is that an appellate court is to apply the prevailing law at the time of the appellate disposition

and not the law prevailing at the time of the rendition of the judgment."

Appellee Budd's citation of this case and accompanying statement is an example of cases and arguments presented in Budd's answer brief which emanate from the Court's resolution of questions arising out of circumstances inapposite to the question involved in this appeal. That the time factor in *Rouse* is not appropriate for application to *Cassidy* is clearly spelled out by the Court in *State v. Lavazzoli,* 434 So.2d 321 (Fla. 1983) wherein the Court stated.

> "While as a general rule it is true that disposition of a case on appeal is made in accordance with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed from was rendered, *Hendeles v. Sanford Auto Auction, Inc.,* 364 So.2d 467 (Fla. 1978); *FLORIDA EAST COAST RAILWAY V. ROUSE,* 194 So.2d 260 (Fla. 1966), *this rule is not applicable when a substantive right is altered."*

This exposes the fact that *Rouse* as cited by Budd is not applicable to *Cassidy* in which substantive rights are involved. Elsewhere in its decision in *Lavazzoli,* the Court stated that the rule against retroactivity "applies with particular force to those instances *where retrospective operation of the law would impair or destroy existing rights."*

No. 3 Reply to Answer Brief of Appellee Firestone Tire and Rubber Company

(Preface)

Replying to Appellees answer briefs in the order received, Appellants turn now to the answer brief of Ap-

pellee Firestone. A front to back careful reading of Firestone's answer brief discloses little that is not a repeat of arguments made in the answer briefs of Appellees Ford and Budd, heretofore replied to. Therefore, in the interest of not burdening this Court with repetitious arguments, Appellants reply will be curtailed and limited, by-passing insofar as possible reply to points of Firestone's answer brief which would serve only to duplicate replies already made to the answer briefs of Appellees Ford and Budd.

I. WHERE CITATIONS IN FIRESTONE'S ANSWER BRIEF ARE SHORTFALLED BY DELETIONS OR OTHERWISE FIRESTONE'S ARGUMENTS THEREABOUT ARE RENDERED INVALID

1. THE PRIMARY MEANING and teaching of *Christopher v. Mungen* 55 So. 273 (Fla. 1911), as a case involving the rule against retroactivity, was inadvertently overlooked or disregarded by Firestone in quoting only one-half of the legal substance making up the rule against retroactivity as declared therein by the Florida Supreme Court:

(a) *What Firestone Quoted:*

> "Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but if the decision is subsequently reversed, *the statute will be held to be valid from the date it first became effective. . .*" (TB-15) Emphasis Firestone's.

(b) *What Firestone Did Not Quote:*

> Beginning immediately following the word "effective. . ."
>
> " . . . even though rights acquired under particular adjudications where the statute was held to be

> invalid *will not be affected by the subsequent decision* that the statute is constitutional."

Significantly, the foregoing portion of the language of the Supreme Court in *Mungen* deleted by Firestone in its statement to this Court enunciates the principle of law on retroactivity directly applicable to the factual situation as it exists in the pending appeal. The history of the Court's coming to the issue of retroactivity in *Mungen* is identical to the history of the issue of retroactivity reaching this Court in *Cassidy*. In *Mungen*, as in the pending *Cassidy* appeal, a court of last resort, the Florida Supreme Court, first construed the statute involved to be *unconstitutional*, as did the Court in *Battilla*, and subsequently the Court construed the subject statute to be *constitutional*, as did the Supreme Court in *Pullum*. Moreover, neither Firestone nor Appellees Ford and Budd in any of the respective answering briefs have cited *a single case* which repudiates or contradicts the rule against retroactively enunciated in *Mungen*.

2. FIRESTONE CLAIMS that Plaintiff, Cassidy, "is in the same position as the plaintiff was in the *Pullum* case." Such is not the case. *Cassidy* was brought *in reliance* on the Supreme Court's decision in *Battilla; Pullum* was brought *in defiance* of the decision of the Supreme Court in *Battilla*. *Pullum* challenged *Battilla* at both this First District Court of Appeal and Supreme Court levels as denying equal protection of laws. *Pullum's* action was pursued not because of any decision of the Court in his favor, but in spite of decisions against his position. *Cates v. Graham*, 451 So.2d 475 (Fla. 1984); *Purk v. Federal Press Company*, 387 So.2d 354 (Fla. 1980); *Bauld v. J. A. Jones Construction Company*, 357

So.2d 401 (Fla. 1978). This appellate court in the main body of its opinion in *Pullum v. Cincinnati, Inc.*, 458 So.2d 1136 (Fla. App. 1 Dist. 1984) stated:

> "However, in *Purk*, the plaintiff also contended that the statute denied her equal protection of the laws which contention was rejected by the Supreme Court." *Id.* 1139
>
> * * * * * *
>
> "The Supreme Court having denied in *Purk* the equal protection attack on the subject statute, we likewise reject such attack in the instant case." *Id.* 1139

Pullum was not in the position of having acted in reliance on any decision of the Supreme Court but in defiance of a number of contrary decisions. Clearly, in *Pullum* no issue was raised or question presented involving retroactivity.

II. FIRESTONE'S ARGUMENT THAT SECTION 95.031(2) FLORIDA STATUTES AS IT EXISTED PRIOR TO *BATTILLA* SHOULD BE APPLIED TO *CASSIDY*, A CASE BROUGHT AFTER *BATTILLA* AND PRIOR TO *PULLUM* WHEN SECTION 95.031(2) DID NOT EXIST IS WITHOUT FOUNDATION IN FACT OR THEORY.

Firestone's theory that, notwithstanding the fact that Appellant Cassidy's action accrued and was commenced after *Battilla* when Section 95.031(2) did not exist, because of *Pullum* it now becomes possible for the Court to reach back and apply Section 95.031(2) to *Cassidy*. Firestone hangs its theory on *Christopher v. Mungen*, supra. (TB-15) More accurately stated, Firestone hangs its theory on the first half of the rule pronounced in *Mungen*, which holds that where a court construes a statute as con-

stitutional and later construes it as unconstitutional "the statute will be held to be valid from the date it first became effective." As heretofore shown under Point I above ends its presentment of *Mungen* without accounting for the last half of the Court's declaration which is an integral part of and necessary to the full and correct meaning of the rule stated in *Mungen.*

After declaring that the statute first held to be unconstitutional will be held valid form the date it first became effective, the Court effectively concluded, without qualification or ambiguity, that rights acquired by actions taken while the statute was held to be unconstitutional, "will not be affected by the subsequent decision that the statute is constitutional." What Firestone seeks to do is to restrict the rule enunciated in *Mungen* with qualifying ambiguity of its own making which would take the true meaning out of the declaration of the Court and the very words it used to express its declarations. The Court held very directly and specifically that rights acquired while the statute was held to be unconstitutional were not to be affected by "the *subsequent* decision" declaring the statute to be constitutional. The flaw in Firestone's theory is that it goes strictly on the "subsequnt decision". *Pullum* has declared Section 95.031(2) constitutional but the very thing established in the rationale of *Mungen* is that even though the "subsequent decision" declares the statute constitutional, as *Pullum* has now declared Section 95.031(2) to be, rights acquired while the statute was held to be unconstitutional cannot be destroyed by subjection to the "subsequent decision."

Here the reader of Appellees answer brief is again made aware of the fact that the arguments relied upon by

Appellants are not responsive to, avoid and leave unrebutted the applicable law of this appeal, that an overruling decision of a Court is not to be applied retroactively to the overruled decision where substantive rights of parties who acted in accordance with the overruled decision would be impaired or destroyed.

CONCLUSION

This Court is requested by Appellees Ford, Budd and Firestone to apply *Pullum* retroactively to *Cassidy*. The facts and *applicable* law of this appeal forcefully demonstrate that Appellees request to the Court is inapt and unwarranted.

Appellants initial brief confronted Appellees with the applicable law of nonretroactivity involved in this appeal, to wit, "*where a statute or law has received a given construction by a court of last resort, the rights, positions, and courses of action of the parties who have acted in conformity with and in reliance upon such construction of the statute are not in anywise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort in overruling its former decision.*"

This rule of law pertaining to prospective/retrospective operation of an overruling decision of the Court, applicable to the facts of the instant case, is what is involved in this appeal; nothing less and nothing different, as Appellees have tried to make it become in their answer briefs, and likewise, parties amici curiae in their answer briefs fail from start to finish to address an answer to this principle of law or cite authority from any case to contradict it.

The instant case is firmly lodged in the above stated principle of law and Appellants failure to dislodge it or repudiate the principle of law in which it is lodged nullifies and renders Appellees position and arguments therein without relevance and beside the point as to the facts and applicable law involved in this appeal.

Appellee Budd, like Appellees Ford and Firestone, argues at great length that notwithstanding the applicable rule of law against retroactivity so fully enunciated in *Florida Forest and Park Service v. Strickland,* supra, and controlling in this appeal, all of the facts of nonretroactivity applying in *Cassidy* must be stripped from Cassidy, disregarded and ignored and have Section 95.031(2) as it existed prior to *Battilla* brought into place to bar Cassidy's action. Implicit in Appellees studied efforts to find, and even create, some way to get around *Strickland* is their recognition, if not admission, that under the facts and law of this appeal in *Strickland, Pullum* is not to be applied retroactively to *Cassidy.* In a last ditch attempt to escape the legal jaws of *Strickland,* Appellees argue that (a) in order for the rule of law in *Strickland* to apply contract or property rights must be impaired and (b) unless the Court's overruling decision has in it the overruling decision must be applied retroactively. Appellees argument (a) is repelled by the decision of this Court in *Bryant v. School Board of Duval County, Fla.,* supra.

Argument (b) is felled by *Tigertail Quarries, Inc. v. Ward,* supra, at page 16 vis-a-vis *Strickland* at page 17 of reply brief. At this point we will not further belabor the conclusion of Appellants reply brief with other reasons why Appellee answer briefs do not meet the test of their contention that *Pullum* should be applied retroactive to *Cas-*

sidy. And we would not have presented this much substantive argument in the conclusion, except for the fact that the massive amounts of argument in the answer briefs of Appellees tend to obscure the real issue of this appeal and the correct law relative to this appeal.

In light of the foregoing, we respectfully submit that the Circuit Court in ordering that *Pullum* be applied retroactively to *Cassidy* was in error and the judgment of the Circuit Court should be reversed.

SMITH, GRIMSLEY, REMINGTON
& KESSLER

/s/ Thomas T. Remington
P.O. Box 2379
Ft. Walton Beach, FL 32549
(904) 243-8194
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to

G. JACK HARDY, ESQ.
Preddy, Kutner & Hardy
501 NE First Avenue
Miami, FL 33132

JOHN N. BOGGS, ESQ.
Attorney at Law
P.O. Box 1937
Panama City, FL 32402

J. DIXON BRIDGERS, III, ESQ.
Carlton Fields, et al
P.O. Box 12426
Pensacola, FL 32582

THOMAS C. SCHULT, ESQ.
2600 Mutual Life Benefits Building
2345 Grand Avenue
Kansas City, MO 64108

GERALD M. MCGILL, ESQ.
Southworth & McGill
202 West Jackson Street
Pensacola, FL 32501

JOHN L. MYRICK, ESQ.
Attorney at Law
625 North 9th Avenue
Pensacola, FL 32501

CATHY JACKSON BURRIS, ESQ.
Attorney at Law
P.O. Box 030067
Ft. Lauderdale, FL 33303-0067

EDWARD T. O'DONNELL, ESQ.
Mershon, Sawyer, Johnston,
Dunwoody & Cole
200 South Biscayne Blvd., Ste. 4500
Miami, FL 33131-2378

WILLIAM BISSETT, ESQ.
Preddy, Kutner & Hardy
501 NE First Avenue
Miami, FL 33132

SHARON LEE STEDMAN, ESQ.
Rumberger, Kirk, Caldwell,
Cabaniss & Burke
11 East Pine Street
Orlando, FL 32802

by mail this 2d day of May, 1986.

/s/ Thomas T. Remington
Attorney for Appellants

INDEX ON APPENDIX

CASES

Felder v. Heim Corporation, Case No. 85-5487-CO (17th Cir. Ct., Broward, Dec. 23, 1985)

Owens v. The Firestone Tire and Rubber Company, Case No. 84-350 Cir-T-10 (M.D. Fla. Jan. 28, 1986)

Harp v. SAFE-LAD Manufacturing Co., et al, Case No. 83-10545-CA (4th Cir. Ct., Duval, March 10, 1986)

Dease v. Jeep Corporation and American Motors Corporation, Case No. CI 85-460-Cir.-ORL (M.D. Fla. Jan. 16, 1986)

IN THE CIRCUIT COURT IN AND FOR
BROWARD COUNTY, FLORIDA

GAIL FELDER,	)	
	)	
Plaintiff,	)	
	)	CASE NO:
v.	)	85-5487-CO
	)	
HEIM CORPORATION, POSITIVE SAFETY MANUFACTURING COMPANY and A & M MACHINERY COMPANY, INC.,	)	
	)	
Defendants.	)	
	)	

ORDER ON DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT

THIS CAUSE came on to be heard on the Defendant's, HEIM CORPORATION and A & M MACHINERY COMPANY, INC., Motions for Summary Judgement. The Court after hearing argument of counsel, reviewing Memorandums of Law and Affidavits, and being fully advised in the premises makes the following findings of fact and conclusions of law:

1. This action involves a products liability claim wherein it is alleged that a punch press was in some manner defective. The parties have stipulated that the accident in question occurred twelve years and two months after the date of delivery of the product to its original purchaser; to wit, the product was delivered in March, 1972; and the accident occurred in May, 1984.

2. Suit was timely filed on March 3, 1985, and there is no defense based on the Statute of Limitations.

3. The sole basis for the Defendants' Motions for Summary Judgment is that the cause of action is barred by the twelve (12) year Statute of Repose, Florida Statute § 95.031.

4. At the time when the Plaintiff was injured and at the time when this law suit was commenced, the Supreme Court had held in *Battilla v. Allis Chalmers Manufacturing Company,* 392 So. 2d 874 (Fla. 1980) that the twelve (12) year Statute of Repose, Florida Statute § 95.031, was unconstitutional as applied to facts consistant with the facts in the instant case.

5. On August 29, 1985, in *Pullum v. Cincinnati, Inc.,* 10 FLW 428 (Fla. August 29, 1985), the Supreme Court receded from its express holding in *Battilla,* supra, and held that the twelve (12) year Statute of Repose was no longer unconstitutional.

6. It is stipulated by counsel and the Court finds that the Florida Supreme Court in the *Pullum* decision did not indicate whether the holding in *Pullum* should be applied both retroactively and prospectively, or whether it's holding should only be prospective as to future cases.

7. The Plaintiff, GAIL FELDER, filed her Complaint (March 3, 1985) prior to the publication of the *Pullum* decision (August 29, 1985) and at a time when the law of Florida as stated by the Supreme Court was that the twelve (12) year Statute of Repose was unconstitutional as applied to those facts.

8. Based upon argument of counsel and the case law presented to me, this Court finds that the ruling of law set forth in *Pullum* is to be applied prospectively only and should not be applied retroactively as to cases which were filed prior to the *Pullum* decision; to wit, August 29, 1985. Therefore, as to the Plaintiff in the instant case, the twelve (12) year Statute of Repose does not act to bar this cause of action.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the Motions for Summary Judgment of the Defendants, HEIM CORPORATION and A & M MACHINERY COMPANY, INC., are denied.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, on this 23rd day of December, 1985.

/s/ JOSEPH E. PRICE, JR
Circuit Court Judge

A TRUE COPY

Copies Furnished:

Kevin A. Malone, Esquire
Krupnick and Campbell, P. A.
700 Southeast Third Avenue, #100
Fort Lauderdale, Florida 33316-1186
Joseph S. Kashi
Edward L. Magill
Gary Gerrard
Cathy Jackson Burris

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CLIFFORD OWENS,

Plaintiff,

—vs—

CASE NO.
84-350 Civ-T-10

THE FIRESTONE TIRE & RUBBER COMPANY,

Defendant.

_____/

ORDER

For the Court's consideration are the Defendant's motion for summary judgment and motion for leave to amend its answer. This is an action in which the Plaintiff alleges personal injury as a result of the explosion of a tire which was being inflated on a "multi-piece wheel designed and manufactured by Firestone." The Plaintiff alleges negligence, strict liability and misrepresentation as the basis for his claims.

1. *Defendant's motion for leave to file an Amended Answer and Affirmative Defenses.*

The Plaintiff concedes that the Defendant should be granted leave to file the Amended Answer and, therefore, the motion is GRANTED. The Clerk is directed to file the Defendant's Amended Answer as of this date.

2. *Defendant's renewed motion for summary judgment.*

The Defendant relies on Section 95.031(2), Florida Statutes, in support of its motion which provides in part:

> (2) Actions for products liability . . . must be begun within the period prescribed in this chapter . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

In support of its motion the Defendant has filed the affidavit of Robert Lee, an employee of the Defendant. The affidavit states that an examination of the "rim base" and the "side ring" produced in discovery by the Plaintiff reveal that the former was manufactured in June 1969 and the latter in January 1965. The affiant further states that Firestone did not maintain inventories in those products until 1973 and 1974; rather, they were typically sold, shipped and delivered to purchasers within four to six weeks after their manufacture and in no event later than six months after their manufacture.

Accepting the latest date for sale contemplated by the affiant, this complaint was clearly filed more than twelve (12) years after their delivery to their original purchaser. In *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla. 1985), the Florida Supreme Court held:

> We recede from this decision, (*Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 824 (Fla. 1980)), and hold Section 95.031(2) is not unconstitutionally violative of Article I, section 21 of the Florida Constitution.

In opposing summary judgment the Plaintiff asserted numerous arguments, however only one of those necessitates discussion. The Plaintiff asserts that the "statute

of repose" is unconstitutional as it bars this action. This action was filed on March 6, 1984 and, when filed, was not barred by Section 95.031(2) because the statute had been declared unconstitutional in the Florida Supreme Court decision in *Battilla, supra.* The rights of the Plaintiff, as far as Section 95.031(2) is concerned, must be determined as they existed when the case was filed.*

Accordingly, the Defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 28th day of January, 1986.

/s/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

---

* There is a serious question as to whether the *Pullum* decision has any retroactive effect.

> . . . if a decision holding a statute unconstitutional is subsequently overruled, the statute will be held valid from the date it first became effective . . . however . . . where a statute has received a given construction by a court of last resort, and property or contract rights have been acquired in accordance with such construction, they will not be destroyed by giving to a subsequent overruling decision a retrospective operation. 13 FLA. Jur. 2d, *Courts and Judges* 159 (1979).

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 83-10545-CA

DIVISION: "O"

JOHN H. HARP and BONITA HARP, his wife,

Plaintiffs,

vs.

SAFE-LAD MANUFACTURING CO., a foreign corporation, and AMERICAN STATES INSURANCE CO., an insurance corporation, and THOMPSON METAL FAB, INC., a foreign corporation,

Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came on for hearing upon the Motion For Summary Judgment filed by the Defendant, SAFE-LAD MANUFACTURING COMPANY.

Arguments of counsel were heard and the only issue to be decided herein is a matter of law.

The essential facts are as follows: The Defendant sold a ladder in August, 1961, from which the Plaintiff herein was injured in August, 1981. He filed suit for damages in September, 1983. Prior to the date of the injury, Florida had a statute of repose which, in effect, limited the filing of all causes of action to within 12 years from the date of original delivery from the manufacturer.

That statute was declared unconstitutional in December, 1980. *Battilla v. Allis Chalmers Manufacturing Com-*

pany, 392 So.2d 874 (Fla., 1980). That same statute and the validity of it was reinstated by the Florida Supreme Court in August, 1985. *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla., 1985)

The Plaintiff's injury and the filing of his Complaint occurred in the interim. The Defendant, in its Motion For Summary Judgment, contends that *Pullum* is retroactive in application and therefore bars Plaintiff's claim since the filing of his Complaint occurred 22 years after delivery of the product to its original purchaser. The Plaintiff counterargues that *Pullum* should not be applied retroactively since the same statute of repose, Section 95.031(2), Florida Statutes, had been declared unconstitutional by the Florida Supreme Court and it was on that ruling and by its authority that the Plaintiff was authorized to commit himself to a course of action to his monetary detriment to claim for damages.

Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla., 1944) essentially states that a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation unless specifically declared by the Opinion to have a prospective effect only; however, the Court recognized a certain well-recognized exception that where property or contract rights have been acquired under and in accordance with such judicial statutory construction such right should not be destroyed or impaired by retrospective operation of a later contrary decision. That Court, in dictum, went on to say that some of the courts have gone so far as to adopt the view that the rights, positions, and *courses of action* of parties who have acted in conjunction with, and in re-

liance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made subsequently overruling its former decision. (Emphasis added.)

The Court finds that at the time of the injury and the filing of Plaintiff's Complaint, it was authorized by the highest court of this state to commit himself to a course of action in reliance thereon to the monetary amount of $3,182.23 (see Plaintiff's counsel's affidavit).

Upon consideration of the foregoing, it is, thereupon,

ORDERED:

That the Motion For Summary Judgment filed by the Defendant, SAFE-LAD MANUFACTURING COMPANY, be and the same is hereby denied.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this 10th day of March, 1986.

ORIGINAL SIGNED:
A. C. SOUD, JR.
A. C. SOUD, JR., Circuit Judge

Copies to:

Gregory W. Johnson, P.A.
SMITH, DAVENPORT, BLOOM,
HARDEN, & JOHNSON
Attorneys for Plaintiffs
2601 Gulf Life Tower
Jacksonville, FL 32207

Karen K. Cole, Esquire
BOYD, JENERETTE, STAAS, JOOS,
WILLIAMS, FELTON, & WIRTZ, P.A.
Attorneys for Defendants
SAFE-LAD and AMERICAN STATES
231 East Adams Street
Jacksonville, FL 32202

William R. Swain, Esquire
WEBB, SWAIN, & O'QUINN
Attorneys for Defendant THOMPSON
630 American Heritage Life Building
Jacksonville, FL 32202

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. CI 85-460-CIV-ORL

RONALD E. DEASE, etc,
et al.,

vs.

JEEP CORPORATION and
AMERICAN MOTORS CORPORATION,

Defendants

DENIED and SO ORDERED
this 16 day of Jan., 1986
/s/ G. Kendall Sharp
United States District Judge

MOTION FOR SUMMARY JUDGMENT

(Filed December 28, 1985)

Defendants, JEEP CORPORATION and AMERICAN MOTORS CORPORATION, move for summary judgment on the ground that the undisputed facts establish that they are entitled to judgment as a matter of law.

MEMORANDUM

Plaintiffs allege that Ronald Dease sustained personal injuries and that his parents sustained derivative losses as a result of a motor vehicle accident that occurred on September 16, 1983 because the vehicle he was driving was defective. They have sued defendants for marketing the vehicle. It is undisputed that the vehicle, a 1969 Jeepster

Commando, was delivered to its original purchaser more than twelve years before this actions was filed. (*See* annexed affidavit of Ray W. Rowell and title certificates) Consequently, this action is time barred.

Section 95.031(2), Florida Statutes, provides that an action for products liability may not be brought more than twelve years after the date of delivery of the completed product to its original purchaser. The constitutionality of this statute was upheld recently by the Florida Supreme Court in *Pullum v. Cincinnati, Inc.*, — So.2d —, Case No. 66,198, 10 *Fla.L.Wkly.* 198, 10 *Fla.L.Wkly.* 428 (Fla. August 29, 1985).

WHEREFORE, defendants request that final summary judgment be entered in their favor because this action is untimely.

I HEREBY CERTIFY that a copy of the foregoing Motion for Summary Judgment was mailed this 23rd day of December, 1985 to:

JOHN R. OVERCHUCK, ESQ.
90 East Livingston Street
Orlando, Florida 32802

BRIAN D. HILL, ESQ.
Post Office Box 2873
Orlando, Florida 32802

CONRAD, SCHERER & JAMES
/s/ Joseph S. Kashi
Post Office Box 14723
Fort Lauderdale, Florida 33302
(305) 462-5500
Attorneys for Defendants.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RONALD DEASE and his parents, GEORGE DEASE and CAROLYN DEASE,

Plaintiffs,

vs. CASE NO.: CI 85-460-CIV-ORL

JEEP CORPORATION and AMERICAN MOTORS CORPORATION,

Defendants.

_____/

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Introduction

This action was commenced in the Circuit Court for the Ninth Judicial Circuit for Orange County, Florida, on 9 January 1985. It was later removed to the United States District Court for the Middle District of Florida on 19 April 1985. The Complaint alleges that the plaintiff, Ronald E. Dease, was injured on or about 16 September 1983 by reason of defects in the design and/or manufacture of a Jeep Jeepster Commando.

When this suit was filed, Section 95.11(3), Fla. Stat. (1983), provided a four-year period for the commencement of such actions with the period commencing to run from the date of injury. Also at the time suit was filed, Section 95.031(2), Fla. Stat. (1983) (enacted in 1977), provided:

> "Actions for products liability . . . must be begun within the period prescribed in this chapter, with the

> period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in § 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser. . . ."

However, in 1980, the Florida Supreme Court had held that Section 95.031(2), under Florida constitutional law, was invalid as applied to persons injured over 12 years from the date of the product's first sale. *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980). *Battilla* represented the law of Florida at the time Mr. Dease's suit was started; therefore, at that time, the only applicable statute of limitations was Section 95.11(3), which as noted provided a four-year period of limitation commencing with the date of injury. The Defendants recognized that such was the state of Florida law by not raising a defense based on the statute of limitations in the initial answer.

On 29 August 1985, after the present action was commenced, the Florida Supreme Court in *Pullum v. Cincinnati,* 476 Do.2d [sic] 657 (Fla. 1985) receded from the position it had taken in *Battilla* and held that Section 95.031(2) bars claims for injuries caused by defective products where such claims are instituted in excess of 12 years from the date of the product's first sale, *even though the injury did not occur within the 12-year period.* After *Pullum,* the Defendants amended their answer to raise a defense based on the statute of limitations and now argue on their Motion for Summary Judgment that Section 95.031(2), Fla. Stat. (1983), as construed in *Pullum,* barred Mr. Dease's claim *before his accident and injury occurred.*

Discussion

The U.S. District Court for the Northern District of Florida and the Florida Circuit Court for Broward, County, Florida, have both held that *Pullum* does not apply retroactively to cases which were filed and not otherwise time-barred before the effective date of *Pullum,* i.e., 29 August 1985. The principles on which these decisions (copies attached hereto) are based are equally applicable to Mr. Dease's case and mandate a denial of the summary judgment.

In 1961, in *Rodrigue v. Aetna Casualty & Surety Co.,* 392 U.S. 352, 23 LEd.2d 360, 89 S.Ct. 1835 (1969), the Court held that the Outer Continental Shelf Lands Act (43 USC § 1331) did not make federal admiralty law applicable to employment-related accident claims by a person injured on an oil rig on the outer continental shelf. It held that the claims of such persons would be governed by the law of adjacent states. In *Chevron Oil Co. v. Huson,* 404 U.S. 97, 30 LEd.2d 296, 92 S.Ct. 349 (1971), the issue before the Court was whether or not the respondent's claim for injuries suffered in 1965 on a drilling rig operated by the petitioner, Chevron Oil Co., on the outer continental shelf off the Gulf Coast of Louisiana was time-barred by the Louisiana one-year statute of limitation. The Supreme Court held that the *Rodrigue* opinion would not be applied retroactively to the respondent where the respondent's injury occurred more than three years before the announcement of the *Rodrigue* decision and the action was instituted more than one year before the decision.

The Court set forth three considerations for the determination of the issue. The first was whether the opinion

in question established a new principle of law either by overruling clear past precedent or by deciding an issue of first impression. The second was whether retroactive application of the opinion would further or retard the rule of decision. The final criterion was whether an injustice would result from retroactive application of the opinion.

With regard to the first criterion, it is obvious that *Pullum* overruled clear past precedent, i.e., *Battilla, supra.* With regard to the second criterion, giving retroactive operation to *Pullum* will in no respect further or retard its operation. Finally, it is clear that an inequity will result from a retroactive application of the *Pullum* decision. The most clear evidence of this is the fact that a retroactive application of the opinion will eliminate Mr. Dease's right to litigate a fully matured and viable claim which he was diligently pursuing when *Pullum* was announced. Had the Florida legislature, as opposed to the Florida Supreme Court, shortened the time for the commencement of Mr. Dease's claim by a statutory enactment, principles of fundamental fairness guaranteed by the Fourteenth Amendment to the U.S. Constitution would have required the legislature to provide Mr. Dease a minimum reasonable period of time for the commencement of his action. Please see *Caldwell v. Alabama Drydock and Shipbuilding Co.*, 161 F.2d 83 (5th Cir. 19—), wherein the court stated:

> "The lawmaking body is the primary judge as to what is a reasonable time limitation for the bringing of actions, and courts will not inquire into the wisdom of a legislative decision establishing a period of limitation unless the time allowed is so manifestly insufficient as to amount to a denial of justice."

Please also see *Wheeler v. Jackson,* 34 LEd. 659, wherein the U.S. Supreme Court stated at page 663:

> "It is the settled doctrine of this court that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect."

If fundamental fairness required legislative deference to Mr. Dease's claim, it logically follows that fundamental fairness at least requires a prospective-only application of the *Pullum* opinion which has exactly the same effect as legislation shortening the period of the statute of limitations.

Based upon the *Chevron* opinion, Chief Judge Stafford of the U.S. District Court for the Northern District of Florida in *Thorsby and Thorsby v. William Stash White & Co.,* Case No. 84-7230, held that *Pullum* has no retroactive application to a product liability claim then in suit and not otherwise time-barred. Likewise Judge Price of the Circuit Court for Broward County, Florida, in *Felder v. Heim Corp. et al.,* Case No. 85-5487, held that *Pullum* would have prospective application only to claims filed subsequent to 29 August 1985.

The principles of *Chevron, supra,* have been expressly recognized by the Florida District Court of Appeal for the Fourth District in *International Studio Apartment Association, Inc., et al v. Lockwood,* 421 So.2d 1119, 1121, and were applied to deny retroactive application to a holding by both the U.S. Supreme Court and the Supreme

Court of Florida that § 28.33, Fla. Stat. (1977) (authorizing clerks of circuit courts to invest registry funds and retain the interest) was unconstitutional.

In *Florida Forest and Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944), the appellee had filed a workmen's compensation claim against his employer, the appellant The claim was heard and denied by a deputy commissioner of the Florida Industrial Commission. Thereafter the order of the deputy commissioner was appealed by the claimant to the circuit court for Taylor County, Florida. The circuit court reversed the deputy commissioner. An appeal was then taken by the employer and the employer's insurance carrier to the Florida Supreme Court. After the appeal was filed, the Florida Supreme Court in *Tigertail Quarries, Inc. v. Ward,* 16 So.2d 812 (Fla. 1944), held that orders of a deputy commissioner may not be appealed directly to a circuit court, but must be appealed first to the full Commission. Based on the *Tigertail* decision. the appellant in *Florida Forest* contended that the circuit court lacked jurisdiction to enter the judgment reversing the deputy commissioner. The Florida Supreme Court held that *Tigertail* would not be given retroactive effect because the procedure and positions taken by the appellee were consistent with the Florida Workmen's Compensation statute as it had previously been construed by a controlling opinion from that court. The Florida Supreme Court in its opinion in *Florida Forest* recognized that generally decisions of a court of last resort overruling former decisions may be given retroactive application but recognized an exception where positions have been taken and rights have accrued under prior law. The Court stated:

"To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. . . . Based upon a recognition of this commonsense exception to the rule, some of the courts have gone so far as to adopt the view that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court overruling its former decision. Accordingly, such courts have given to such overruling decisions a prospective operation only, in the same manner as though the new construction had been added to the statute by legislative amendment. . . ." (page 253)

Thus, under either the principles of *Chevron* or *Florida Forest, supra,* the opinion in *Pullum* should not be given retroactive effect to terminate rights which had accrued in favor of the Plaintiff under the law of Florida prior to *Pullum.* To do so would be so fundamentally unfair as to be a violation of the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted on the above authority that Defendants' Motion for Summary Judgment should be denied.

DATED this —— day of ————, 1986.

LOWNDES, DROSDICK, DOSTER,
KANTOR & REED, P.A.

By: John A. Reed, Jr.
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802
(305) 843-4600
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to GORDON JAMES, III, ESQ., 707 Southeast Third Avenue, 5th floor, Ft. Lauderdale, FL 33316; JOHN R. OVERCHUCK, ESQ., 90 E. Livingston St., Orlando, FL 32802; and BRIAN D. HILL, ESQ., P. O. Box 2873, Orlando, FL 32802, this — day of ————, 1986.

John A. Reed, Jr.

No. 86-2041

Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL REPLY BRIEF

THOMAS T. REMINGTON
Smith, Grimsley, Remington
& Kessler
P.O. Box 2379
Fort Walton Beach, FL 32549
904/243-8194
Attorney for Appellants

August 25, 1987

TABLE OF CONTENTS

Page

APPELLANTS REQUEST THAT PAPERS SUBMITTED BE TREATED AS PETITION FOR WRIT OF CERTIORARI 1

REPLY 2

I. Appellees Argument that Appellants Failed to Assert in the State Courts Below the Federal Issue Asserted to This Supreme Court of the United States in Appellants Jurisdictional Statement is Unsupported and Flatly Rebutted by the Documented Facts of the matter 2

II. Contrary to Appellees Contention the Federal Issue is Substantial 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases — Page

Bush v. Reid
516 P.2d 1215 (Alaska 1973) 5

City of Cincinnati v. Hafer
49 Ohio St. 60, 30 N.E. 197 (1892) 5

Duke Power Company v. Carolina Environmental Study Group, Inc.
438 U.S. 59, 98 S.Ct. 2620, 2638 n. 32 (1978) 8

Eddings v. Volkswagenwerk, A.G.
635 F.Supp. 45 (N.D. Fla. 1986) 4

El Paso v. Simmons
379 U.S. 188, 13 L.Ed. 446, 451,
85 S.Ct. 577 (1965) 2

Faucheaux v. Alton Ochsner Medical Foundations Hospital & Clinic
470 So.2d 878 (La. 1985) 5

Gelpcke v. City of Dubuque
1 Wall 175, 17 L.Ed. 520 (1863) 3

George v. Firestone Tire and Rubber Co.
No. CGA 85-0117 3

George v. Firestone Tire and Rubber Co.
CGA 85-0117-MMP
U.S. SCN Fla., June 13, 1986 4

Gregory v. Colvin
363 S.W.2d 539 (Ark. 1963) 5

Harco v. Southern Pac. R. Co.
62 P.2d 443 (1 DCA Cal. 1936) 3

Lamb v. Volkswagenwerk Aktiengesellschaft
631 F.Supp. 1144 (S.D. Fla. 1986) 4

Louisiana Public Service Comm. v. FCC
467 U.S. ____ 90 L.Ed. 2d 369, 378,
106 S.Ct. ____ (1986) 1

Martinez v. Fox Valley Bus Lines
17 F.Supp. 576 (N.D. Ill. 1936) 5

Munn v. Illinois
94 U.S. 113, 134, 24 L.Ed. 77 (1877) 7

TABLE OF AUTHORITIES—Continued

Cases — Page

Owens v. Firestone Tire and Rubber Co.
84-350-Civ-T-10
(U.S. D.C.M. Fla., Jan. 28, 1986) 4
People of State of New York v. Zimmerman
278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928) 6
Pullum v. Cincinnati, Inc.
476 So.2d 657 (Fla. 1985) 1, 2, 7
Pullum v. Cincinnati, Inc.
476 So.2d 657 (Fla. 1985) appeal dism'd.
160 S.Ct. 1626, 90 L.Ed. 2d 174 (1986) 8
Reid v. Solar Corporation
69 F.Supp. 626 (U.S. Dist. Ct. N.D. Iowa 1946) 3
Renton v. Playhouse Theaters
U.S. ____, 89 L.Ed. 2d 29, 35,
106 S.Ct. ____ (1986) 1
Second Employers' Liability Cases
223 U.S. 1, 50, 32 S.Ct. 169,
175 56 L.Ed. 327 (1912) 7
Silkwood v. Kerr-McGee Corp.
404 U.S. 238, 78 L.Ed. 2d 443,
452 104 S.Ct. 615 (1948) 1
Silver v. Silver
280 U.S. 117, 122, 50 S.Ct. 57,
58, 74 L.Ed. 221 (1929) 7
Udall v. Mason
26 A. 2d 101 (Sup. Ct. Vt. 1942) 3
Usuary v. Turner Elkhorn Mining Co.
428 U.S. 1, 16, 96 S.Ct. 2882,
2829 49 L.Ed. 2d 752 (1976) 7

Other Authorities

U.S. Const. XIV ..... Passim
28 USC Sec. 1257(2) 1
28 USC Sec. 1257(3) 1
28 USC Sec. 2103 2
Fla. Stat. Sec. 95.031 8

APPELLANTS REQUEST THAT PAPERS SUBMITTED BE TREATED AS PETITION FOR WRIT OF CERTIORARI

The Substance of Appellants Jurisdictional Statement Renders It, Properly, a Petition for Writ of Certiorari Under 28 USC, Sec. 1257(3), Not an Appeal Under Sec. 1257(2).

Appellants acknowledge having by mistake submitted their cause to this Court as an appeal under 28 USC Sec. 1257(2) when, properly, it called for submission as a petition for writ of certiorari under Sec. 1257(3). Appellants jurisdictional statement is not intended to, nor does it in any way, draw in question any state statute. The true matter in which appellants appeal is grounded is clearly recognizable. That the federal ground of appellants cause to this Court clearly appears is attested to by appellees own statement of it:

> In essence, appellants assert the retroactive application of the Florida Supreme Court decision of *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) destroyed appellants property right in an accrued cause of action and thereby violated his federal due process rights under the Fourteenth Amendment to the United States Constitution. (Appellee The Budd Company's Brief, Page 8)

It cannot be shown that what appellants asserted in the state courts below ever was intended to, nor ever did, draw into question the validity of a state statute. Likewise, the matter presented in appellants jurisdictional statement in this Court does not draw into question "the validity of a statute" but presents a matter set to the requirements for consideration as a petition for writ of certiorari under 28 USC Sec. 1257(3). Accordingly, appellants ask that the Court, in the exercise of its discretion, treat the papers submitted by appellants as a petition for writ of certiorari. *Louisiana Public Service Comm. v. FCC, 467 U.S.*_____ 90 L.Ed. 2d 369, 378, 106 S.Ct. _____ (1986); *Renton v. Playhouse Theaters, U.S.*_____, 89 L.Ed. 2d 29, 35, 106 S.Ct. _____(1986); *Silkwood v. Kerr-McGee Corp.,* 404

U.S. 238, 78 L.Ed. 2d 443, 452, 104 S.Ct. 615 (1948); 28 USC Sec. 2103, *El Paso v. Simmons,* 379 U.S. 188, 13 L.Ed. 446, 451, 85 S.Ct. 577 (1965)

REPLY

I

Appellees Argument That Appellants Failed To Assert In The State Courts Below The Federal Issue Asserted To This Supreme Court of the United States in Appellants Jurisdictional Statement Is Unsupported And Flatly Rebutted By The Documented Facts Of The Matter.

Background of Reply to Appellees Contention

The sum and substance of the federal issue asserted throughout by appellants to the Florida State Court below spoke to the point that:

> Under provisions of the US Constitution and decisions of the US Supreme Court the property right of a citizen of the United States in his or her accrued cause of action is not to be destroyed by applying a change in the law retroactively to his or her cause of action which accrued before the law changed.

Documented Facts of Reply to Appellees Contention

1. *In the Florida Circuit Court:* Appellants brief to the Court in opposition to appellants motion for summary judgment stated:

> (T)he Supreme Court (referring to the U.S. Supreme Court) has consistently held that the taking of property or the denial of property rights in any of its varied forms without due process of law violates the Fifth Amendment of the U.S. Constitution. We submit that, on balance, the Florida Supreme Court would take this factor into account in any decision involving a question of retrospectivity/prospectivity stemming from *Pullum (Pullum v. Cincinnati, Inc.,* 476 So. 2d 657 (Fla. 1985)) **Appendix P. 2a**

As to property rights existing in causes of action appellants brief cited the language of cases, as follows:

> *Reid v. Solar Corporation,* 69 F. Supp. 626 (U.S. Dist. Ct. N.D. Iowa, 1946: "(E)xisting actions constitute 'property' within the meaning of the constitutional guarantees.", *Harco v. Southern Pac. R. Co.,* 62 P. 2d 443 (1 DCA Cal. 1936) "The right to recover damages for a personal injury, as well as the money recovered as damages, is property and may be regarded as a chose in action.", *Udall v. Mason,* 26 A. 2d 101 (Sup. Ct. Vt., 1942) "A vested right of action is property in the same sense that tangible things are property." **Appendix P. 2a**

2. *In the Florida District Court of Appeal:* Point I of appellants brief was hinged on the United States Supreme Court case of *Gelpcke v. City of Dubuque,* 1 Wall 175, 17 L.Ed. 520 (1863). The binding effect of *Gelpcke* in the Court's holding that rights existing prior to change of the law could not be destroyed by retroactively applying the changed law was set forth at the outset of appellants brief:

> In *Gelpcke* the Iowa Supreme Court first, in 1853 construed as constitutional a statute enacted by the Iowa legislature; then, some six years later, in 1859, construed the subject statute as unconstitutional. The Supreme Court held that the 1859 overruling decision could not be applied retroactively to its overruled 1853 decision.
>
> **Brief of Appellee The Budd Company, p. App. 9**

3. *Subsequent to The Filing of All Briefs in The Florida District Court of Appeal,* on June 13, 1986, the U.S. District Court, Northern District, Florida decided the case of *George v. Firestone Tire & Rubber Co.,* No. CGA 85-0117 (a case facsimile identical to appellants case), in which it was held that the decision of the Florida Supreme Court in *Pullum* could not be applied retroactively to bar plaintiff's action because to do so

would deprive plaintiff of a property right in his accrued cause of action which the Court stated:

> would plainly violate plaintiff's federal due process rights.

By way of supplemental authority appellants promptly communicated the subject case to the Florida District Court of Appeal.

4. *Thereafter on Oral Argument in the District Court of Appeal:* Appellant stressed and urged to the Court the decision of the Federal District Court in *George v. Firestone Tire & Rubber Co.*[1] respecting the protection afforded by the United States Constitution against retroactively depriving a person of the property right existing in his or her accrued cause of action. **Appendix P. 3a**

5. *In Appellants Motion to the District Court of Appeal for Rehearing,* joined in support by the Academy of Florida Trial Lawyers as Amicus Curiae, appellants urged:

> However, regardless of whether Appellants obtained a verdict or judgment, this Court failed to address the fact that Appellants' cause of action, when it accrued

---

[1]In its decision the District Court of Appeal denoted it acted with knowledgeable awareness of *George v. Firestone Tire & Rubber Co.*, communicated to the court by appellants as supplemental authority and urged to the court on oral argument by appellants in their assertion of the federal constitutional issue.

Footnote 3 of District Court of Appeal opinion.

Several cases in federal district court have addressed this issue with varying results. E.g. compare *Eddings v. Volkswagenwerk, A.G.*, 635 F. Supp. 45 (N.D. Fla. 1986), and *Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F.Supp. 1144 (S.D. Fla. 1986), with *George v. Firestone Tire and Rubber Co.*, Case No. CGA-85-0117-MMP (U.S. SCN Fla., June 13, 1986), and *Owens v. Firestone Tire and Rubber Co.*, Case No., 84-350-Civ-T-10 (U.S. D.C.M. Fla., Jan. 28, 1986) [Available on WESTLAW, DCTU Database]

in February of 1982, vested in the Appellants the right to prosecute this cause of action. This Court has overlooked the argument of the Academy that Appellants' cause of action is a chose in action which is vested property interest subject to constitutional protections under both the Florida and U.S. Constitutions.

This Court overlooked and/or failed to address the Academy's citation of *Martinez v. Fox Valley Bus Lines,* 17 F. Supp. 576 (N.D. Ill. 1936); *Gregory v. Colvin,* 363 S. W. 2d 539 (Ark. 1963); *Faucheaux v. Alton Ochsner Medical Foundations Hospital and Clinic,* 470 So.2d 878 (La. 1985); *Bush v. Reid,* 516 P. 2d 1215 (Alaska 1973); and *City of Cincinnati v. Hafer,* 49 Ohio St. 60, 30 N. E. 197 (1892) which support the position of Appellants and Amicus that the Appellants' cause of action is a vested property right which cannot constitutionally be vitiated without an alternative remedy or means of redress. **Appendix P. 5a**

6. *In the Florida State Supreme Court on Petition for Discretionary Review:* Appellants clearly asserted as the third ground of their petition that the decision of the District Court of Appeal violated appellants rights under the Fifth and Fourteenth Amendments of the United States Constitution. Appellants brief specified:

> Petitioners cause of action is a vested property right which cannot be taken away without being violative of the Fifth and Fourteenth Amendments of the U.S. Constitution. **Appendix P. 7a**

Appellants underpined its assertion with page references to the federal case of *George v. Firestone Tire & Rubber Company, supra* which, as before indicated, is facsimile identical to appellants case. As in its jurisdictional statement in the United States Supreme Court appellants incorporated in its brief a complete printing of its references to the subject case. (Full treatment of federal issue as set

forth in *George v. Firestone Tire & Rubber Co.,* asserted by appellants throughout, commences in the appendix of appellants jurisdictional statement at the bottom of page 20a, continuing to page 26a)

The facts of what transpired speak to the proof: *The ground of the federal issue asserted by appellants was brought to the attention of the Florida state courts below.* In *People of State of New York v. Zimmerman,* 278 US 63, 73 L.Ed. 184, 49 S. Ct. 61 (1928), this Court pointed out that if the record as a whole shows either expressly or by clear intendment that the ground of petitioner's claim was brought to the attention of the court with fair precision and in due time the claim is to be regarded as having been adequately presented.

Appellants respectfully submit to this United States Supreme Court, in light of the clear abundance of facts, appellees contention that appellants failed to assert the federal issue in the state courts below is unfounded, defies the facts, and should not be allowed because an acutely substantial federal issue needing to be passed upon is embodied in appellants petition as will next be demonstrated in this Reply.

II
CONTRARY TO APPELLEES CONTENTION THE FEDERAL ISSUE IS SUBSTANTIAL

Appellees briefs failed to respond or advert to what was shown in appellants jurisdictional statement to render substantial the question presented in appellants petition.

> The Courts of this nation are served whenever this Court acts to deal with a new or another not well recognized question of retroactivity. Such is appellant's case here where the decision of this Court will serve to give an answer in form of law and legal guideline whether one's property rights in his *accrued* cause of action is protected against the retroactive application of an overruling decision which changes the

law from what it was when his cause of action accrued and his property rights therein vested. What the decision of this Supreme Court of the United States will do to settle the federal questions involved renders it distinctively substantial.

The failure of appellees to speak to this point appears to flow from their failure to see the question of retroactivity as it applies to the facts of appellants case. The whole of appelles argument against appellants case on its merits and the substantiality of the federal question it involves readily appears in the following statement set forth in appellees brief:

> In essence, appellants assert that the retroactive application of the Florida Supreme Court decision of *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985), destroyed Appellants' property right in an accrued cause of action and thereby violated his federal due process rights under the Fourteenth Amendment to the United States Constitution. It is especially clear here that this argument is without merit because, as this Court has held, there is no vested property right in a pending tort claim:
>
> > Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of common law.' *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object, *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that 'otherwise settled' expectations may be upset thereby. *Usury v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16, 96 S. Ct. 2882, 2829, 49 L.Ed. 2d 752 (1976) . . . Indeed, statutes limiting

liability are relatively commonplace and have consistently been enforced by the Courts.

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 2638 n.32 (1978). As there is no vested property right in a pending tort claim there is no merit to Appellants' challenge under the Fourteenth Amendment.

Brief Appellee The Budd Company, P8

In the above appellee quotes verbatim footnote 32 *Duke Power Company v. Carolina Environmental Study Group, Inc.* supra. Neither *Duke Power* nor any of the cited cases support appellees flat statement that "there is no vested property right in a pending tort claim." Undoubtedly, if appellee so believes this to be true, appellee came to believe it from misapprehending what *Duke Power* and the cited cases hold, which is: that a right of action in a tort claim, at common law or by statute, may be abolished at any time, but not the accrued cause of action, which vested before the right created by statute or existing at common law was extinguished. In *Duke Power* the constitutionality of the Price-Anderson (Nuclear) Act was in issue; in *Second Employers' Liability Cases,* supra: the constitutionality of the Employers Liability Act; in *Silver v. Silver,* supra: the constitutionality of Guest Statute; in *Usury v. Turner Elkhorn Mining Co.,* supra: the constitutionality of Federal Coal Mine Health and Safety Act.[2]

---

[2]Similarly, appellee The Budd Company's citation of *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) appeal dism'd., 160 S Ct 1626, 90 L.Ed. 2d 174 (1986) at page 9 of its brief is patently irrelevant and inappropriate because *Pullum's* appeal to this Court was set to challenging the constitutionality of the Florida statute of repose (Sec. 95.031 Fla. Statutes) which appellants do not nor ever have in any court. The destruction of appellants property rights in his accrued cause of action by retroactively applying *Pullum* is here, as it has been throughout in the Florida state courts, the sole matter of appellants cause to the courts.

In appellant's Jurisdictional Statement, at pages 7 and 8, we set out specific references to the decision of the U. S. District, N.D. Florida in *George v. Firestone Tire & Rubber Company,* supra, as the main body of Appellant's briefing of the federal question asserted. The arguments presented in appellees opposing briefs cite large numbers of cases (some 66 different cases) without ever directly addressing or rebutting the rationale of the *George* case.

The federal question herein is substantial in that the argument and cases relied upon by appellees evidence the kind of misinterpretations of questions of retroactivity which call for a decision of this Court to better make known how far and in what direction a court may go in applying any of its decisions retroactively without impermissibly depriving a citizen-person of his or her rights guaranteed by the Constitution of the United States and the decision of this United States Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectively submitted that Appellant's Request That Papers Submitted Be Treated As Petition For Writ of Certiorari, and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS T. REMINGTON
SMITH, GRIMSLEY, REMINGTON
& KESSLER
25 Walter Martin Road
P.O. Box 2379
Ft. Walton Beach, FL 32549
(904) 243-8194

ATTORNEY FOR APPELLANTS

No. 86-2041

In the

Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX TO JURISDICTIONAL REPLY BRIEF

THOMAS T. REMINGTON
Smith, Grimsley, Remington
& Kessler
P.O. Box 2379
Fort Walton Beach, FL 32549
904/243-8194
Attorney for Appellants

APPENDIX

TABLE OF CONTENTS

Excerpt from Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment, filed in Circuit Court in and for Escambia County, Florida, November 19, 1985 ..... 1a

Excerpt from Notice of Supplemental Authority, filed District Court of Appeal, First District, State of Florida, July 15, 1986 ..... 3a

Excerpt from Motion for Rehearing and Rehearing En Banc and Request for Certification, filed District Court of Appeal, First District, State of Florida, October 3, 1986 ..... 4a

Excerpt from Brief of Petitioner on Jurisdiction, filed in the Supreme Court of Florida, November 25, 1986 ..... 6a

Excerpt

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

CIVIL ACTION

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Plaintiffs,

vs. Case No. 83-1934-CA-01

THE FIRESTONE TIRE AND RUBBER COMPANY, a corporation, and THE FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Defendants.

_____/

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

* * * * * * *

4. The Florida Supreme Court's recognition in *Florida Forest and Park Service* of the property rights existing in a party's cause is reinforced by courts in all jurisdic-

tions in their expression of the law. e.g. "existing actions constitute 'property' within the meaning of the constitutional guarantees", *Reid v. Solar Corporation,* 69 F. Supp. 626; (U.S. Dist. Ct. N.D. Iowa, 1946). "The right to recover damages for a personal injury, as well as the money recovered as damages, is property and may be regarded as a chose in action", *Harco v. Southern Pac R. Co., 62 P. 2d 443 (1 DCA Cal. 1936);* "A vested right of action is property in the same sense that tangible things are property", *Udall v. Mason,* 26 A. 2d 101 (Sup. Ct. Vt., 1942).

5. Very much akin to the law enunciated by the U.S. Supreme Court in *Chevron* are the cases (so numerous and well known to court as to be recognized by judicial notice without citation) in which the Supreme Court has consistently held that the taking of property or the denial of property rights in any of its varied forms without due process of law violates the Fifth Amendment of the U.S. Constitution. We submit that, on balance, the Florida Supreme Court would take this factor into account in any decision involving a question of retrospectivity/prospectivity stemming from Pullum.

* * * * * * * * *

s/

THOMAS T. REMINGTON
Smith, Grimsley, Remington
& Kessler
P.O. Box 2379
Ft. Walton Beach, FL 32549
904/243-8194

Excerpt

IN THE DISTRICT COURT
OF APPEAL, FIRST
DISTRICT, STATE OF FLORIDA

EFFIE DELL CASSIDY, etc., et al,

Appellants,

v. Docket No. BK-198

THE FIRESTONE TIRE AND
RUBBER COMPANY, etc., et al,

Appellee,

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Rule 9.210 (g) Florida Rules of Appellate Procedure, Appellant files the attached supplemental authority reflecting:

1. CS/HB832; 1986 Florida Legislature, Chapter 86-272, reflecting amendment to Florida Statutes 95.11(3), effective July 1, 1986.

2. *Thomas L. George and Tommie George, his wife, v. Firestone Tire and Rubber Company, et al,* Case No. CGA 85-0117-MMP, United States District Court, Northern District, Florida, Order dated June 13, 1986.

* * * * * * *

s/

THOMAS T. REMINGTON
Smith, Grimsley, Remington
& Kessler
P.O. Box 2379
Ft. Walton Beach, FL 32549
904/243-8194

Excerpt

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Docket No. BK-198
CASE NO. 83-1934-CA-01
FLA. BAR NO.: 338788

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE AND RUBBER COMPANY, a corporation and FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

_____/

MOTION FOR REHEARING AND REHEARING EN BANC AND REQUEST FOR CERTIFICATION

COME NOW the Appellants, above-named, and THE ACADEMY OF FLORIDA TRIAL LAWYERS, as Amicus Curiae in Support of Appellants in the above-referenced appeal, and file this motion for rehearing and rehearing en banc and request for certification pursuant to Rules 9.030 and 9.331, Fla. R. App. P., from this Court's opinion dated September 23, 1986 and in support thereof would state as follows:

* * * * *

However, regardless of whether Appellants obtained a verdict or judgement, this Court failed to address the fact that Appellants' cause of action, when it accrued in February of 1982, vested in the Appellants the right to prosecute this cause of action. This Court has overlooked the argument of the Academy that Appellants' cause of action is a chose in action which is vested property interest subject to constitutional protections under both the Florida and U.S. Constitutions.

This Court overlooked and/or failed to address the ACADEMY'S citation of *Martinez v. Fox Valley Bus Lines,* 17 F. Supp. 576 (N.D. Ill. 1936); *Gregory v. Colvin,* 363 S. W. 2d 539 (Ark. 1963); *Faucheaux v. Alton Ochsner Medical Foundations Hospital and Clinic,* 470 So. 2d 878 (La. 1985); *Bush v. Reid,* 516 P. 2d 1215 (Alaska 1973); and *City of Cincinnati v. Hafer,* 49 Ohio St. 60, 30 N. E. 197 (1892) which support the position of Appellants and Amicus that the Appellants' cause of action is a vested property right which cannot constitutionally be vitiated without an alternative remedy or means of redress.

* * * * *

Thomas Remington, Esq.
P. O. Box 2379
Ft. Walton Beach, FL 32549

Attorney for Appellants

and

Cathy Jackson Lerman, Esq.

Attorney for THE ACADEMY OF FLORIDA TRIAL LAWYERS
P. O. Box 030067
Ft. Lauderdale, FL 33303

Excerpt

IN THE SUPREME COURT OF FLORIDA

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY and SHARON CASSIDY, as wife of KENNETH CASSIDY, Petitioners, v. THE FIRESTONE TIRE AND RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation, Respondents.	Case No. 69,668

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

SMITH, GRIMSLEY, REMINGTON,
& KESSLER
Thomas T. Remington
P. O. Box 2379
Fort Walton Beach, FL 32549
(904) 243-8194

ATTORNEYS FOR APPELLANTS

* * * * *

III.

MOREOVER, THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS VIOLATIVE OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AS GIVEN FULL FAITH AND CREDIT AND ADHERED TO BY THE FLORIDA SUPREME COURT

Petitioners cause of action is a vested property right which cannot be taken away without being violative of the Fifth and Fourteenth Amendments of the U.S. Constitution. See *George v. Firestone,* No. CGA 85-0117 MMP, N.D. Fla. June 13, 1986 (Paul, J.) at Appendix pages A-19-20, 23).

* * * * *